TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. ~~354~~. 64

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

JAMES HOLMES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED NOVEMBER 14, 1890.

(14,422.)

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1 In the Supreme Court of the United States.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES HOLMES, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court of the State of Washington, as successors of the judges of the supreme court of the Territory of Washington, Greeting:

Because in the record and proceedings of the supreme court of the Territory of Washington, and also in the rendition of the judgment by said court of a plea which was in the said supreme court of the Territory of Washington at the time when you became, as the judges of the supreme court of the State of Washington, the successors of said territorial supreme court and which is now in the said supreme court of said State before you as such successors, between the Northern Pacific Railroad Company and James Holmes, a manifest error hath occurred, to the great damage of the said Northern Pacific Railroad Company, as by its complaint appears, we, being willing that the error of the supreme court of the Territory of Washington, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if judgment be therein given, *that* under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same,
2 to the Supreme Court of the United States, together with
this writ, so that you may have the same at Washington on the second Monday in October next, to wit, October 13th, 1890, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the fifth day of May, in the year of our Lord one thousand eight hundred and ninety.

[Seal United States Circuit Court, District of Washington.]

A. REEVES AYRES,
Clerk of the Circuit Court of the United States
for the District of Washington.

In the Supreme Court of the United States of America.

THE NORTHERN PACIFIC RAILROAD CO., Plaintiff in Error,
vs.
JAMES HOLMES, Defendant in Error.

STATE OF WASHINGTON, } *ss:*
County of Lincoln,

John W. Merritt, being duly sworn, deposes and says that he is the duly appointed and qualified deputy sheriff of the county of Lincoln, in the State of Washington; that he is a citizen of the United States, over twenty-one years of age, and a resident of the State of Washington; that he is not interested in or a party to the above-entitled cause and is competent to be a witness on the trial thereof; that on the seventh day of May, A. D. 1890, at the city of Sprague, in the county of Lincoln and State of Washington, he served upon the above-named defendant in error, James
3 Holmes, the foregoing writ of error filed in this cause with the clerk of the supreme court of the State of Washington by delivering a true copy of said writ of error to James Holmes, the defendant in error, personally by handing said copy to him at his residence, at the said city of Sprague.

JOHN W. MERRITT.

Subscribed and sworn to before me this 7 day of May, A. D. 1890.

{ Seal Harry H. Sharp, Notary Public, State of Washington.
Expiration of Commission, Mar. 2, 1894. }

HARRY H. SHARP,
Notary Public in and for Washington.

Residence, Tacoma, Wash.

4 [Endorsed:] 453. In the Supreme Court of the United States. Northern Pacific R. R. Co., pl'ff in error, *vs.* James Holmes, def't in error. Writ of error. Filed May 5, 1890. Sol. Smith, clerk of the supreme court, State of Washington.

5 NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs. } # 453.
JAMES HOLMES, Defendant in Error.

This cause having been heretofore submitted to the court upon the transcript of the record of the district court of the fourth judicial district of Washington Territory, holding terms at Cheney, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, and having filed its opinion in writing, it is now, on this second day of February, A. D. 1888, on motion of Andrews and Allen, Esquires, of counsel for defendant in error, considered, adjudged, and decreed that the judgment of the said district court be, and the same is hereby, affirmed with costs, and that the said James Holmes recover of and from the said Northern Pacific Railroad Company the costs of this action, taxed and allowed at — dollars, and that execution issue therefor.

And it is further ordered that this cause be remitted to the said district court for further proceeding.

NORTHERN PACIFIC RAILROAD CO., Plaintiff in Error,
vs.
JAMES HOLMES, Defendant in Error.

The plaintiff in error, by J. H. Mitchell, Jr., one of its attorneys of record herein, having moved in open court for an order of the court granting said plaintiff in error leave to file a petition for rehearing in the above-entitled cause and time within which
6 to perfect proceedings upon appeal after the determination
of said petition for rehearing in the event that the same should be refused, as well as for the staying of all proceedings in the cause pending the filing and disposition of said petition and during such time as may be allowed for perfection of appellate proceedings thereafter, and the court, being fully advised in the premises, grants said motion, and now, therefore, it is ordered by the court that the plaintiff in error be, and hereby is, granted leave to file a petition for rehearing herein on or before the seventeenth day of July, 1888, and is further granted sixty days' time after the determination of said petition within which to perfect proceedings upon appeal in the event that said petition for rehearing should be denied; and it is further ordered that pending the filing and determination of said petition for rehearing and said further time of sixty days that all proceedings upon the judgment rendered herein be stayed; that no proceedings be had in the lower courts during said time, and that no remittitur issue out of this court during said time.

7 NORTHERN PACIFIC RAILROAD, Appellants,
vs.
JAMES HOLMES, Appellee.
No. 453. Appeal from 4th District at Cheney.

Opinion Rendered February 2, 1888.

By ALLYN, *J.:*

The appellee filed his complaint in the district court at Cheney, in February, 1884, averring negligence of the appellant in running a train over "B" street crossing, in the town of Sprague, rapidly, without warning, and in maintaining a freight depot adjacent to "B" street, and leaving a line of freight cars partly abutting on said crossing, thereby obstructing the view of those using said street.

That appellee approaching said crossing, his view being obstructed by the depot and cars stationed as above, his buggy collided with this moving train and appellee was injured, etc.

Appellant admits the location of the depot and cars, denying negligence; admits the moving of the train which occasioned the injury, but denies it was running rapidly or without warning; affirmatively avers negligence of the appellee contributing to the injury.

There was a trial and a verdict rendered, which the court set aside. A second trial was had and a verdict rendered for ten thousand dollars ($10,000.00), which is now being reviewed. The case having been brought to the supreme court at the January term, 1886, the judgment of the court below was reversed for the reason stated by the majority of the court that it clearly appeared from the evidence that the plaintiff, in driving upon the railroad track without stopping and going forward to look and listen, had been guilty of contributory negligence, and that the lower court ought, on that ground, to have granted the motion of the defendant for a nonsuit.

A petition for rehearing from this decision having been granted, the cause has been again presented to this court.

The principal discussion has turned upon what we may designate as three main questions: 1st. The appellant claims that the evidence showed contributory negligence on the part of the appellee to such an extent that it became a question of law for the court, and for the refusal of the court to determine this question and in submitting it to the jury there is error. 2d. That instruction given (No. 13 of appellant's brief) relating to the preponderance of the evidence is error. 3d. That instruction given (No. 14 of appellant's brief) relating to appellee's ability and opportunity to see and judge also error.

There are very many and numerous other errors assigned, but practically all of the long and exhaustive presentation of this case have been made to turn upon what are called the three main questions as above.

The appellee testified that approaching this crossing he saw the
train disappear, going away from the crossing, and then drove
8 on slowly, his view being obstructed by such cars standing,
the depot, etc. He was driving a reliable pair of horses, and
carefully.

There was evidence that two other teams, coming from the opposite direction, whose driver had full view of such departing train, started across the same crossing, these teams and appellee meeting not far from the track of the standing cars.

It was in evidence that the yardman or switchman was but a short distance signalling such moving train, and it is evident he saw or readily could have seen all these teams, including that of appellee, as the latter approached the track on which such train was moving. There was a strong conflict of evidence as to the ringing of the bell, the rate at which the train was moving, and, in fact, as to many of the material questions.

The jury found a general verdict for appellee, and, at the request of appellant and by direction of the court, returned a large number of special findings upon particular questions of fact submitted to them in writing, which questions and answers thereto are as follows:

1. Had the plaintiff a knowledge of the crossing where the collision occurred? Ans. Yes.

2. Did the plaintiff know at the time of said collision and prior thereto that said crossing was within the switching yard of defendant? Ans. Yes.

3. If said crossing was within the switching yard of the defendant, was the plaintiff in the habit of crossing at the point where the collision occurred at and prior thereto? Ans. Yes.

4. Did the plaintiff know at and prior to the collision that the defendant was in the habit of using said place of crossing and to the west of the same in the conduct of its business and run its trains to and fro over the same? Ans. Yes.

5. How many times a day did the trains, including switching trains, of the defendant pass over the crossing where the collision occurred? Ans. An indefinite number of times.

6. At what point was the west end of the west box car on the side track adjoining the depot building at the time of the collision? Ans. Infringed on plank crossing 2 to 5 feet.

7. How many box cars were on the side track adjacent to the freight-house? Ans. Three.

10. For what purpose was the building called freight depot used at the time of the collision? Ans. Receiving and discharging freight.

11. Was it clear or cloudy on the day the collision occurred? Ans. Clear day.

12. Was it calm, windy, or boisterous on the day of the collision? Ans. A little breeze.

13. At what distance from the place where the collision occurred could the noise of the train be heard if the bell was not rung? Ans. From fifty feet to two hundred feet, in our judgment.

14. Did the noise of the train and wagon of Fish and Breslaun and plaintiff's own vehicle interfere with plaintiff's hearing the bell if any bell was sounded? Ans. Yes; we think it would.

15. Did the noise of the said wagons and teams interfere
9 with the hearing of the rumbling of the train with which he
collided? Ans. Yes; we think it did.

16. At what distance from the place where the collision occurred could the plaintiff have heard the rumbling of the morning train if he had stopped and listened after the wagon of Fish and Breslaun had passed over the crossing? Ans. We judge from 100 to 400 feet.

17. Had the plaintiff stopped and listened at the point where he said he listened could he have heard the ringing of a bell if any bell had been sounded, notwithstanding the noise of the teams crossing said track immediately prior to the collision? Ans. He could.

18. At what rate of speed was the train which collided with the plaintiff's vehicle to and at the time of said collision running. Ans. Between six and ten miles an hour.

23. How far east of the place where the collision occurred in the point where the train stopped whilst going east, reversed, and com-

menced running back toward the place where the collision occurred? Ans. One hundred — forty feet.

24. At what rate of speed was said train running at the time of said collision? Ans. About six miles an hour.

26. How many drinks of whisky had the plaintiff taken the day of and before the collision, and was the plaintiff at all affected by the whisky he had taken at the time of the accident? Ans. Five or six drinks during the day; we have no evidence to show that he was affected.

27. Did the plaintiff or not, when sixteen feet from the track at the crossing on which the colliding train ran, have an opportunity of seeing the approaching train? If so, was the view free and complete or partial? State how much of the train he could see at that distance. Answer. Yes; a partial view; could see one quarter of caboose.

28. Could the plaintiff or not have stopped fifteen feet from the track at the crossing on which the colliding train was running and by so stopping have avoided the collision? Ans. He could not, to the best of our judgments.

30. Had the plaintiff looked in the direction which the train that collided with his carriage came when within forty feet of the place where the collision occurred — have seen the approaching train, if the train was then approaching, if said train was within a distance of 70 feet of said crossing? Answer. No.

31. Could the plaintiff, when he was at a distance of fifty feet from the place where the collision occurred, have seen the approaching train, if it was then approaching, if it was at any place within 80 feet of the place said collision occurred? Answer. We think he could not before the filling in of said street.

33. Was the plaintiff, as he was approaching the place where the *locc*ision occurred, warned of the approaching train? If so, by whom? If he was so warned, did he hear the warning? Answer. Yes; by Fish and Peterson. We think he did not hear the warning.

34. Had the plaintiff been exercising reasonable caution and care in approaching the crossing would he have heard what Fish and Peterson said to him? Answer. Under the circumstances, we think not.

35. Did the plaintiff know that the train with which his carriage subsequently collided, previous to the collision, had passed
10 to the east from the place where the collision occurred? Answer. Yes.

36. Did he know that the train with which the collision occurred was a switching train or was it his impression that the train he had just seen move towards the east was a switching train? Answer. We think it was his impression that it was a switching train.

38. Could the plaintiff have avoided the collision by stopping to listen? Answer. Yes; if he had stopped at a safe distance.

39. Was the bell ringing at the time the train was backing down towards the crossing continuously and at the time of the collision?

Answer. We believe from the evidence it was not ringing continuously while backing down at the time of collision.

40. Did the yardmaster or any one else just prior to the collision make any motion at the train when the plaintiff was approaching the place where the collision occurred; and, if so, where was such person standing and was there anything to prevent the plaintiff seeing said motions; and, if so, what? Answer. The person standing at the switch did make motions for the train to back down; there was nothing to obstruct the view of plaintiff from seeing those motions.

41. Did the plaintiff see said motions; and, if he did not, if he had been exercising reasonable care and caution could he have seen said motions? Answer. He did not, we think; he may have been using reasonable care and caution and still not have seen the motions.

42. Did the plaintiff Holmes, at the time he was approaching said place where said collision occurred, have reason to expect that the switch of any train might pass over the crossing where the collision occurred at any moment? Answer. At the time he approached the crossing, and seeing the train going east, he had no reason to suppose it would return so soon.

43. At what rate of speed was Holmes' team traveling as he approached the place where the collision occurred while his horses were trotting? Answer. About five miles an hour.

44. At what rate of speed was Holmes' team traveling as he approached the place where the collision occurred while the horses were walking and what distance did said horses walk? Answer. At the rate of four miles an hour; his horses walked about 25 or 30 feet.

45. Did the plaintiff stop his team shortly before reaching the place where the collision occurred; if so, at what distance from said place and for what length of time, if plaintiff did not stop his team, did he check his team and slow up before reaching the place of the collision? Answer. No; he did not stop his team. Yes; we think he did slow up his team.

46. If the crossing at which the collision occurred was within the switching yard of the defendant, was the said crossing a public highway? Answer. Yes; it was.

47. When the plaintiff was at a point of 100 feet from the crossing where the collision occurred, for what space between said point and said crossing was the view of said train obstructed? Answer. Judging from our own observation since the grading or filling in of the street, we think there was a space of 20 or 25 feet that the plaintiff could not have seen the train after it had passed east over the crossing; that space was at a point about 45 or 50 feet from the place of accident north of crossing.

11 These special findings or special verdicts would sustain the general verdict fully, unless it be No. 17, which finds in substance that plaintiff could have heard the bell, had one been sounded, if he had stopped and listened.

And upon this proposition, which raises the same question involved in the motion for a nonsuit, the principal argument is made. It is contended in this case that the failure of appellant to stop, look, and listen was of itself contributory negligence which justified the taking of the case from the jury.

There are cases where this rule will apply and where, if these things are not done, the party will so clearly contribute to his injury, is beyond question.

Many of the cases presented are those of regular trains, the arrival of which the complaining party is properly charged with notice — and must give way to, knowing the time of their being due. Such trains have the absolute right of way as against any one crossing the track.

It is said this rule will apply to a snitch-train and that it is always on time and thus always has the right of way. This is impracticable. If the proposition is true, then the traveler has no rights, but the switch-train may run backwards and forwards across the streets and crossings regardless of the life or safety of human beings, for it is "always on time," as appellant agrees, and, *ergo*, always has the absolute right of way.

In this case the appellee, so far as he could see the train, saw it was going away from him as he approached the track, with his view obstructed by the acts of the appellant. He had no reason to expect this departing train to be backed down upon him in the short distance he had to go, and without warning, for in question 39 the jury find "the bell was not ringing continuously," unless the argument that a switch-train always has the absolute right of way is sound, which we cannot concede.

That it may or may not be a party's duty to "stop, look, and listen" is dependent on the status of each case; it does not apply to this. We have very grave doubts if it would have changed the result had the appellee done this, or tried to, as from the findings of the jury (No. 28) he could not have stopped in less than fifteen feet, and as this switch-train was almost continuously passing and repassing he had to rely on the appearance of safety and go ahead.

The R. R. Co. had left but one mode of passing from one part of the town to the other, had partially blockaded that, had forced the inhabitants to take the risk of some danger, perhaps, or remain isolated from their neighbors and business. This dangerous condition of things, brought about by the R. R. Co., we are agreed was wholly inexcusable, and we do not see but that the appellee acted as a reasonably prudent man would act in the light of all the surroundings, and was not guilty of negligence contributing to the injury. In R. R. Co. *vs.* Houston, 95 U. S., 697, the party was a trespasser on the right of way of the company, was walking upon the track, and, by merely looking and by the least effort, might have avoided the injury.

In Schofield *vs.* C. M. & St. P. R. R. Co., 14 U. S., 15, parties drove
on a roadway parallel to the track and near it, with a perfectly clear
and unobstructed view of the track open to them for a long distance,
deliberately drove upon the track. There is not the least
12 possible similarity between such cases as these and the case
at bar.

They afford no argument whatever in this case. The same criticism can be applied to all of the immense number of cases to which we are cited by appellant. What we have said above is fully supported by the case of Continental Improvement Co. *vs.* Stead, 95 U. S., 161.

The court very properly left the question to the jury and to have done otherwise would have been equivalent to saying that the aid of a jury was not necessary to settle any disputed question of fact.

The next error claimed is the one above referred to as the second in the three main points involved and presents for consideration the following instruction given to the jury:

"If, however, the witnesses who testify differently to the same facts are all of them — equal candor, fairness, intelligence, and truthfulness and equally well corroborated by all the other evidence and are upon an equal footing as to interest in the result of the suit, then the preponderance of evidence as to that fact would be determined by the number of witnesses."

That this instruction, presented as an abstract proposition, might be error may be conceded, and yet we do not believe any intelligent man could be mislet by it.

The very purpose for which a jury is called is to "weigh" the witnesses. They know this. They are engaged in doing — all through the trial and fully understand it.

This instruction could not mislead unless the jury might understand they need not test the knowledge and means of knowledge, the credulity, etc., of the witnesses. In other words, that they need not weigh the evidence.

It seems almost as strained to claim the interference asked for this instruction by appellant as it would be to say the jury might infer they need not weigh the evidence or need not try the case. We do not believe any such impression was created by it. Moreover, this was not given as an abstract proposition.

Very long instructions were given, all as one (they were numbered later). As given, it was one consecutive statement of the propositions involved, given in narrative form, each consecutively following the other, and all could only be read or taken as a whole.

Immediately preceding this alleged faulty proposition, and practically a part of it, the court instructed the jury that "the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or statement of facts," and that the jury should take into consideration the opportunities for seeing or knowing the particular things about which they testify, their conduct and demeanor, their interest or lack of interest in the result, the probability or improbability of the truth of their statements."

Then followed the proposition stated, as complained of, which practically told the jury that the term preponderance meant the greater number, when considered with what preceded it and as it must have been read; and finally, if the above is not a sufficient answer, we may add that if the words "greater number" could

have worked injury it was one which appellant cannot be
13 heard to complain —, as a careful examination of the record will disclose the "greater number" were on the side of appellant.

The next objection, being the last of what we have termed the three main questions, is to the following instruction given by the court:

"If at any time before plaintiff put himself across the track of the approaching train he was in a position he could have seen the train moving towards the crossing well enough to understand its movements," etc.

The words "well enough" are objected to, but we fail to appreciate the objection.

Objection is made to nearly all that was done and at every stage of the proceedings.

We cannot comment on all this, but it is sufficient to say we have carefully examined them and evdeavored to give to them all that consideration which a case of this magnitude and importance demands. We entirely concur in the action of the court below, and feel that it is fully sustained by the record.

The judgment of the court below is affirmed.

FRANK ALLYN,
Associate Justice.

I concur.

W. G. LANGFORD,
Associate Justice.

I dissent.

R. A. JONES,
Chief Justice.

McNAUGHT & MITCHELL,
For Appellant.

W. R. ANDREWS &
ALLEN, THOMPSON & CROWLEY,
For Appellee.

14 NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES HOLMS, Defendant in Error.
} # 453.

Decision of the supreme court of the Territory of Washington having been heretofore, on the second day of February, 1888, rendered in the above-entitled cause in favor of the defendant in error, affirming the judgment of the district court of the fourth judicial district of Washington Territory, holding terms at Cheney, in the county of Spokane; and on the said day an order having been made by said supreme court giving plaintiff in error until the 17th day of July, 1888, within which to file a petition for rehearing and staying all proceedings on said judgment in said court as well as in said district court during the time provided for the filing of said petition and during the pending thereof; and the said supreme

court having on said day made an order granting plaintiff in error, in the event of the denial of said petition when the same should be heard and determined, a period of sixty days within which to perfect proceedings upon appeal to the Supreme Court of the United States and providing a stay of proceedings, as before, during the said period of sixty days; and the said petition having been filed within the time provided by the order of said court and having been pending undetermined at the time of the admission of the State of Washington and the organization of this the supreme court of said State; and this court having directed the defendant in error to answer said petition, the said answer having been filed within the time provided by said order; and said petition
15 and answer having been taken under advisement by this
court, now, on this 8th day of March, A. D. 1890, the court, being fully advised in the premises, denies said petition for rehearing; to which ruling and judgment as well as the judgment of the supreme court of said Territory affirming the judgment of said district court plaintiff in error, by its counsel, excepts, and said exception is allowed; and now, on this 8th day of March, 1890, the motion of plaintiff in error for the allowance of a writ of error to the Supreme Court of the United States and the granting of a superd-as thereon in the above-entitled cause having been on this day brought on to be heard, and it now, on the same day, appearing to the court from the affidavit of John H. Mitchell, Jr., counsel for plaintiff in error, and from the papers, records, and files in this cause that the value of the matter in dispute in the above-entitled cause exceeds the sum of five thousand dollars, exclusive of courts, and the court being otherwise fully advised in the premises grants said motion:

Now, therefore, it is ordered by the court that a writ of error to the Supreme Court of the United States to the judgment of the supreme court of the Territory of Washington, now a record of this court, and to the judgment, order, and ruling of this court upon the petition for rehearing be, and hereby is, allowed.

And it is further ordered that the plaintiff in error be, and hereby is, given and allowed sixty days from this date within which to file a supersed-as bond and security for the prosecution of said writ of error, and that said supersed-as bond be, and hereby is, fixed at twenty thousand dollars.

And it is further ordered that all proceedings upon the judgment heretofore rendered in this cause by the supreme court of said Territory and upon the orders made in this court in pursuance thereof, as well as all proceedings in this cause in the district court of said Territory heretofore referred to, or such superior courts as
16 has by operation of law become the successor of said district
court, be, and hereby are, stayed during said time allowed for the filing of said bond, and that upon the filing of said bond all said proceedings be stayed during the pendency of said writ of error, provided said bond is filed within the time required by this order.

And it is further ordered that the Honorable T. L. Stiles, judge of the supreme court of the State of Washington, be, and hereby is, designated as the judge who shall take and approve the security which shall operate as a supersed-as upon the suing out of said writ of error.

17 In the Supreme Court of the State of Washington.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES HOLMES, Defendant in Error.
} Affidavit.

STATE OF WASHINGTON,
County of Thurston. }

John H. Mitchell, Jr., being first duly sworn, upon oath deposes and says that he is one of the attorneys for the plaintiff in error in the above-entitled cause; that he has been an attorney in said cause ever since action therein was commenced and during its pendency in the several territorial and State courts; that he is familiar with the matter in dispute in said action; that the value of the matter in dispute in said action exceeds the sum of five thousand dollars, exclusive of costs; that this is a cause in which the judgment on which a writ of error is sought to be prosecuted was rendered by the supreme court of the Territory of Washington and is a cause which arose within the limits of said Territory of Washington prior to the admission of the State of Washington.

JOHN H. MITCHELL, JR.

Subscribed and sworn to before me this 8th day of March, 1890.

SOL. SMITH,
Clerk of Supreme Court of Washington.

On the back is endorsed: "Filed March 8th, 1890. Sol. Smith, clerk."

18 Northern Pacific Railroad Co.'s office, No. 35 Wall street, New York city.

MARCH 5TH, 1889.

I, Samuel Wilkeson, the secretary of the Northern Pacific Railroad Company, certify that the annexed is a true copy from the minutes by me kept as such secretary of a meeting of the board of directors of said company duly held on the 21st day of February, 1889, and that a resolution, of which the annexed is a copy, was on that day unanimously adopted by said board of directors, and to this certificate for verification I affix the corporate seal of said company.

(CORPORATE SEAL.)

SAM'L WILKESON,
Secretary N. P. R. R. Co.

(*Resolution.*)

Resolved, That Charles H. Prescott, of Tacoma, Washington Territory, be, and he is hereby, authorized and empowered to execute, under seal or without seal, as may be required, and deliver for and in the name of this company any and all bonds or undertakings which may be required to be executed by or for this company in any and all legal proceedings now pending or that may hereafter be commenced, in any court in the State of Oregon or in the Territory of Washington or in the Territory of Idaho according to law or the rules and practice of any such court, including all bonds or undertakings necessary to be given by this company on appeal to the higher courts of said State or Territories or to the Supreme Court of the United States, and that the secretary deliver to the said Charles H. Prescott four copies of this resolution duly certified.

19 In the Supreme Court of the United States.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES HOLMES, Defendant in Error.
} Bond.

Know all men by these presents that we, The Northern Pacific Railroad Company, the plaintiff in error in the above-entitled cause, by Charles H. Prescott, its second vice-president and attorney-in-fact, and C. W. Griggs and A. W. Foster, of Tacoma, Pierce county, Washington, are held and firmly bound unto James Holmes, of the city of Sprague, in the State of Washington, the defendant in error in the above-entitled action, in the sum of twenty thousand (20,000) dollars, to be paid to the said James Holmes, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, as well as the successors and assigns of said railroad company, firmly by these presents.

Sealed with our seals and dated this fifth day of May, A. D. 1890.

Whereas the above-named Northern Pacific Railroad Company hath *presented* a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the Territory of Washington:

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railroad Company shall prosecute its writ of error to effect and answer all costs and damages if it fail to make good its plea, then this obligation shall be void; otherwise to be and remain in full force and virtue.

NORTHERN PACIFIC RAILROAD COMPANY,
20 By CHARLES H. PRESCOTT, [SEAL.]
Its Second Vice-President and Attorney-in-fact.
C. W. GRIGGS. [SEAL.]
A. G. FOSTER. [SEAL.]

Sealed and delivered in the presence of—
JOHN H. MITCHELL, JR.
WALTER LOVEDAY.

STATE OF WASHINGTON, } *ss:*
County of Pierce, }

C. W. Griggs and A. G. Foster, being each first duly sworn, upon oath deposes and says each for himself that he is one of the sureties named in the above and foregoing bond; that he is a resident of the State of Washington, and that he is worth the sum of twenty thousand (20,000) dollars over and above all debts and liabilities and property exempt from execution.

C. W. GRIGGS.
A. G. FOSTER.

Subscribed and sworn to before me this fifth day of May, 1890.

[NOTARIAL SEAL.] WALTER LOVEDAY,
Notary Public in and for the State of Washington,
Residing at City of Tacoma, Pierce County, said State.

Taken before and approved by me this fifth day of May, A. D. 1890.

T. L. STILES,
Associate Justice of the Supreme Court of the State of Washington.

(Endorsed:) In the Supreme Court of the United States. Northern Pacific R. R. Co., pl'f in error, *vs.* James Holmes, def't in error. Bond on suing our writ of error for operation as supersedeas. Filed this 5th day of May, 1890. Sol. Smith, clerk. Mitchell, Ashton & Chapman, att'ys for pl'f in error.

21 In the Supreme Court of the United States.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error, }
vs.
JAMES HOLMES, Defendant in Error. }

UNITED STATES OF AMERICA, *ss:*

To James Holmes, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1890, to wit, on Octobor 13th, 1890, pursuant to writ of error filed in the clerk's office of the supreme court of the State of Washington, wherein The Northern Pacific Railroad Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness my hand this 5th day of May, A. D. 1890.

T. L. STILES,
Associate Justice, Supreme Court of Washington.

In the Supreme Court of the United States of America.

THE NORTHERN PACIFIC RAILROAD CO., Plaintiff in Error,
vs.
JAMES HOLMES, Defendant in Error.

STATE OF WASHINGTON,
County of Lincoln, } *ss:*

John W. Merrit, being duly sworn, deposes and says that he is the duly appointed and qualified deputy sheriff of the county of Lincoln, in the State of Washington, and he is a citizen of 22 the United States over the age of twenty-one years and a resident of the State of Washington; that he is not interested in or a party to the above-entitled cause and is competent to be a witness on the trial thereof; that on the seventh day of May, A. D. 1890, at the city of Sprague, county of Lincoln, in the State of Washington, he served upon the above-named defendant in error, James Holmes, the foregoing citation filed in this cause with the clerk of the supreme court of the State of Washington by delivering a true copy of the said citation to James Holmes personally by handing said copy to him at his residence, in the said city of Sprague.

JOHN W. MERRITT. [S. S.]

Subscribed and sworn to before me this 7th day of May, A. D. 1890.

HARRY H. SHARP,
[NOTARIAL SEAL.] *Notary Public in and for Washington,*
Residence, Tacoma, Wash.

(Endorsed:) 453. In the Supreme Court of the United States. Northern Pacific R. R. Co., pl'ff in error, *vs.* James Holmes, def't in error. Citation. Filed May 5, 1890. Sol. Smith, clerk supreme court of the State of Washington.

23 In the Supreme Court of the United States.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES HOLMES, Defendant in Error.

Of October term, in the year of our Lord one thousand eight hundred and ninety.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Northern Pacific Railroad Company, by James McNaught, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

24

First.

That the supreme court of the Territory of Washington erred in affirming the judgment of the district court of the fourth judicial district of Washington Territory, holding terms at Cheney, in and for Spokane county.

Second.

That said court erred in not directing that the motion of plaintiff in error for a nonsuit be granted.

This was and is error for the reasons following, to wit:

1. That the evidence adduced on behalf of the defendant in error shows contributory negligence in this, that it shows that the noise of the approaching train could have been heard by defendant in error at least 200 feet from the place where the collision occurred.
2. That the defendant in error was warned of the approaching train in time to avoid the collision.
3. That the defendant in error did not look for the approaching train.
4. That he did not listen.
5. That defendant in error knew that the place where the collision occurred was within the switch-yards, and that the train was working at that time in the yard. That defendant in error knew the location of the switches, and was bound to know that the train might reverse at the first switch east of the crossing and reach the place of the collision at the time it did.
6. The testimony of the defendant in error shows that the colliding train was running at usual rates and times at the time of the collision.

25

Third.

That there was error committed in not instructing the jury to find a verdict for the plaintiff in error.

This was and is error for the following reasons, to wit:

1. That the evidence adduced on behalf of the plaintiff in error did not lessen in effect or diminish in number the reasons or grounds which had existed in favor of the nonsuit which should have been granted plaintiff in error, but intensified and strengthened the same.
2. The contributory negligence of the defendant in error was made more apparent by the evidence adduced on behalf of the plaintiff in error.
3. The evidence adduced on behalf of the plaintiff in error did not disclose any such negligence on its part as would lead to the inference that defendant in error might have been injured, as he was, even if no negligent act of his own had contributed to the same.

Fourth.

The following instruction should have been given to the jury, to wit: "If you find from the evidence that the bell of the locomotive was ringing at the time plaintiff approached the crossing, and that the train was not running faster than six miles per hour, you should find a verdict for the defendant."

Refusal to give the same was error for the following reasons, to wit:

1. The ringing of the bell was the usual method of giving notice of the movement of trains in the switch-yard, and the rate of six miles per hour was no more than the usual rate of speed of trains moving in the switch-yard, both of which facts were well known to defendant in error and were fully established by the evidence.

26 2. The only questions of negligence involved in the case, either by the pleadings or the evidence, were the questions, 1st, was the bell ringing, and, 2nd, was the train moving at more than the usual rate of speed.

Fifth.

The giving of the following instruction was error, to wit:

"Upon the question as to whether the defendant by its servants pushed its train down upon the plaintiff with such speed as to constitute that an act of negligence, and as to whether the defendant failed to give warning of the approach of its train, and was guilty of negligence therein, I instruct you that the defendant was bound to use such care in pushing its train over public highways in the town of Sprague as men of common prudence and intelligence would ordinarily use under like circumstances, taking into consideration the frequency with which the crossings were used by the public, the difficulties by reason of the situation and surroundings of the crossing in avoiding collisions, and the results likely to ensue from collision, and that the absence of such care by the defendant in this case would make the defendant guilty of negligence for which the plaintiff may recover if he was injured thereby."

This is erroneous in the following particulars, to wit:

1st. It submits to the jury the question as to whether the train was pushed "with such speed as to constitute that an act of negligence," while there was no evidence as to whether the speed of the train was unusual or unsafe or such as to constitute negligence.

2. It assumes as conceded or established a controverted point, to wit: That the place where the collision occurred was a public highway.

27 3. It assumed that if plaintiff in error failed to give due warning and run its trains at a rapid rate, that these acts themselves constitute negligence, and that the plaintiff could recover notwithstanding he was guilty of contributory negligence.

4. It assumes that the train was pushed down on defendant in error. The testimony shows that the train was at its usual work in the switch-yard, and that defendant in error attempted to cross that switch-yard while the train was at such work at a place travelled by the public.

Sixth.

The giving of the following instruction was error, to wit:

"What would be a rate of speed that a man of common prudence and intelligence would feel to be a safe one at the particular time and place when and where this accident occurred, and whether the train of cars was pushed at a rate at the time of the accident, as well as the question whether a man of common prudence and intelligence would deem it safe to push a train of cars with a locomotive at said time and place without giving warning of the approach of the train by ringing the engine bell or blowing the engine whistle, or by some other adequate means, and whether such warning was given, are questions of fact for you to determine from the evidence in this case."

This is erroneous in the following particulars, to wit:

1. It declares that the rate of speed should have been such as a man of common prudence might deem to be safe, while under the rule applicable to this case the rate of speed should have been such as was found by experienced railroad men to be safe.

2. It submits to the jury, and allows them to consider, the question whether other warning than ringing the bell was given.

3. It submits the question of rate of speed to the jury.

28

Seventh.

The following instruction was and is erroneous, to wit:

"If, however, the witnesses who testify differently to the same facts are all of them of equal candor, fairness, intelligence, and truthfulness, and equally well corroborated by all the other evidence, and are upon equal footing as to interest in the result of the suit, then the preponderance of evidence as to that fact would be determined by the number of witnesses."

It is erroneous in the following particulars, to wit:

1. It ignores the fact that some witnesses might testify positively and affirmatively, and others doubtfully and negatively.

2. The word "intelligence," as used therein, is not limited to intelligence concerning the particular matter testified to.

3. It does not include equal experience, knowledge, or information.

4. It furnishes to the jury an easy method of calculating on which side, in the judgment of the trial judge, the evidence preponderates. The judge thereby impresses upon the jury his determination of a fact which it is peculiarly their province to find.

Eighth.

The following instruction was and is erroneous, to wit:

"If at any time before the plaintiff put himself across the track of the approaching train he was in a position he could have seen the train moving toward the crossing well enough to understand its movements and to avoid collision with it, but carelessly drove across the track without looking to ascertain its movements, then he was guilty of contributory negligence, which would prevent him from recovering in this action."

29 It is erroneous in the following particulars, to wit:

1. If the defendant in error could see the train he was

bound to ascertain its movements before attempting to cross the track.

2. It should have been qualified so as to make it the duty of defendant in error in crossing the track in the switch-yard of plaintiff in error to avoid switch-trains running at the usual rates.

3. The words "well enough" are objectionable. If, in approaching the railroad crossing in question, defendant in error could see or hear the train, but not "well enough" to understand its movements, he was bound to ascertain whether it was approaching the crossing or not. If while in a state of uncertainty he attempted to cross he was taking the chances and should abide the consequences.

Ninth.

It was error to refuse to give the following as an instruction to the jury, to wit:

"If it appears from the evidence that the plaintiff is not entirely free from any degree of negligence which contributed to the injury, then the plaintiff cannot recover in this case, notwithstanding you may find that the defendant is guilty of some degree of negligence which contributed to the injury."

It is error to reject or refuse to give any such instruction, on the ground that it is misleading, for any negligence, however slight, on the part of the injured person, if approximate or contributing to the injury, would prevent a recovery in an action therefor.

30 Tenth.

It was error to refuse to give the following as an instruction to the jury, to wit:

"Every person is bound to know that a railroad crossing is a dangerous place, and he is guilty of negligence unless he approaches it as if it were dangerous. If you find from the evidence that the plaintiff was acquainted with the place where the collision occurred, and also find that said place was within the switching yard of the defendant, and also find that the defendant did not have a regular time for switching in said yard or was moving its trains at any time whenever business required therein, and that plaintiff knew such to be the practice of the defendant, then the plaintiff was bound to know that a train might be approaching at any time, and if he attempted to cross said track without ascertaining whether one was coming or not, but, on the contrary, drove directly onto the track and the collision resulted, he was guilty of contributory negligence and cannot recover in this action."

Eleventh.

It was error to refuse to give the following as an instruction to the jury, to wit:

"It is not the exercise of ordinary care and prudence for a person to drive a team directly onto a railroad crossing known to him at the time to be dangerous without making an effort, by stopping and listening or otherwise, to ascertain whether a train is approaching or whether it is safe."

Twelfth.

It was error to refuse to give the following as an instruction to the jury, to wit:

31 "If you find that the building called depot mentioned in the pleadings and the cars on the track adjacent thereto so obstructed the view of the plaintiff that he could not see the train, this fact called him to greater care and watchfulness in driving upon the track than if the view was open, and if in the exercise of ordinary care and vigilance the plaintiff could have heard the noise of the coming train and then drove upon the track without first fully ascertaining that there was no danger of collision, then he was guilty of negligence and cannot recover in this action."

Thirteenth.

It was error to refuse to give the following as an instruction to the jury to wit:

"And I further charge you that if you find from the evidence that the defendant's servants or servant did ring the bell of the engine moving the train which collided with plaintiff's carriage before said collision while said train was at a distance sufficient to enable plaintiff to have stopped his team and avoided the collision, and the plaintiff failed to do so, either for the reason that he did not hear the bell ring, or, hearing it, did not heed it, then you will find for the defendant in this case."

Fourteenth.

It was error to refuse to give the following as an instruction to the jury, to wit:

"It is shown by the evidence, and not disputed, that the plaintiff was accustomed to pass this crossing, and may be presumed to know and be acquainted with the usual rate of speed with which trains pass this crossing, and if this train was not moving at a greater rate he should be held as bound to exercise such care and
caution as to avoid collision with such train moving at
32 usual rates. So that unless you find that the train was moving at an unusual and unreasonable rate of speed you would be warranted in finding that the plaintiff was guilty of negligence which contributed to the injury and hence not entitled to recover."

Fifteenth.

It was error to refuse to give the following as an instruction to the jury, to wit:

"I further charge you that if you find that plaintiff's view of the approaching train was totally or partially obstructed as he approached the place where the collision occurred; that his opportunity of hearing the noise of said train was obstructed by the noise of the teams of Fish and Breslaun, and that the plaintiff's sense of hearing was dulled by the liquor he had been drinking on that day, and if you find that the plaintiff had reason to believe that a train might cross the place where the collision occurred at any moment, and that there are no other circumstances in this case to the contrary of the aforesaid-enumerated circumstances, then it was the duty of the plaintiff to stop and listen for the coming train before going upon the track, and if he failed to do that—and it is conceded that he did—then your verdict should be for the defendant."

Sixteenth.

It was error for the court to base any of his instructions upon the view by the jury and the things there observed, and it was error for the jury to consider them as evidence. All the instructions and findings thereon were erroneous.

Seventeenth.

33 It was error to deny the motion of plaintiff in error for judgment on the special findings notwithstanding the general verdict. It was also error to deny the motion of plaintiff in error to set aside the general verdict because inconsistent with the special findings and not sustained by them.

Eighteenth.

It was error to enter up judgment for the defendant in error. That said action was erroneous in the following particular, to-wit: That the general verdict is inconsistent with, and contrary to, the special verdict in this, the jury, in the special verdict, find that the plaintiff could have seen and heard the coming train in time to have avoided the collision if he had looked and listened, and that he was warned by Fish and Peterson, that the train was running, at the time of the collision, six miles an hour; that it was the switch-train; that plaintiff knew it — running in the switch yard, and that he was acquainted with the yard.

Nineteenth.

It was error to enter up judgment in favor of defendant in error for the reason that the thirteenth, eighteenth, twenty-fifth, twenty-eighth, thirty-first, fortieth, forty-first, and forty-second findings, upon which the general verdict is based, are evasive and contradictory, and not sustained by the evidence.

Twentieth.

That the court erred in denying the petition of plaintiff in error for a rehearing.

34 And the said Northern Pacific Railroad Company, plaintiff in error, prays that the judgment aforesaid may be reversed, anulled, and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of said judgment.

JAMES McNAUGHT,
Attorney for Plaintiff in Error.

35 In the Supreme Court of the United States.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES HOLMES, Defendant in Error.
} Præcipe.

To Sol. Smith, clerk of the supreme court of the State of Washington, and as such custodian of the records of the supreme court of Washington Territory:

You are hereby directed to annex to the writ of error heretofore sued out in the above-entitled cause an authenticated transcript of the record, together with the assignment of errors and prayer for reversal, and also the citation to the defendant in error, and return the same, with said writ of error, at the day and place therein mentioned, transmitting the same to James H. McKenney, clerk of the Supreme Court of the United States.

You will include in said transcript the following, to wit:

1. Writ of error (original).
2. Judgment of the supreme court of Washington Territory, with order granting time to file petition for rehearing and staying proceedings.
3. Opinion of court.
4. Order denying petition for rehearing, allowing writ of error, fixing bond, staying proceedings, and naming judge to issue citation.

36 5. Affidavit showing value of matter in dispute.
6. Bond.
7. Citation.
8. Assignment of errors and prayer for reversal.
9. Præcipe.
10. Certificate of clerk of Territorial district court.
11. Amended complaint.
12. Demurrer to amended complaint.
13. Amended answer.
14. Reply.
15. Verdict of jury.
16. Special questions to jury.
17. Answers to same.
18. Exceptions to answers to special findings.
19. Order overruling same.
20. Judgment on verdict.
21. Notice of appeal.
22. Bill of exceptions.
23. Certificate of clerk of supreme court.

JAMES McNAUGHT,
Attorney for Plaintiff in Error.

37 TERRITORY OF WASHINGTON, } ss:
Fourth Judicial District, }

—, D. A. Clement, clerk of the district court of the Territory of Washington and for the fourth judicial district thereof, do hereby certify that the following hereto attached is a full, true, and correct transcript of so much of the record in the above-entitled cause as I am by statute required on writ of error to transmit to the Supreme Court.

In testimony whereof I have hereunto set my hand and the seal of said district court this twelfth day of June, A. D. 1886.

D. A. CLEMENTS, *Clerk.*

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38 In the District Court of Washington Territory and for the First Judicial District Thereof, Holding Terms at Cheney, in Spokane County.

JAMES HOLMES, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. } Amended Complaint.

The plaintiff for amended complaint alleges:

First. That at all the times and dates hereinafter mentioned the defendant was and now is a corporation created under and by virtue of an act of the Congress of the United States entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound by the northern route," approved July 2nd, 1864, and was at all such times operating a railroad known as the Northern Pacific railroad in and through the city of Sprague, in Lincoln county, Washington Territory, together with the tracks, rolling stock, and other appurtenances thereunto belonging.

Second. That the tracks and line of way of said road in said Sprague are laid through what is called Railroad street and the principal public highway in said Sprague used in crossing said Railroad street is called "B" street and crosses said Railroad street at about right angles, and that on the east side of said "B" street and in the said Railroad street and fronting on one of the tracks of said railroad and abutting on said "B" street the defendant had caused to be erected a large high building, which at all the times hereinafter mentioned was still maintained by the defendant, and which then obstructed and now obstructs the view of any person approaching from the north on said "B" street towards said
39 Railroad street of any car or locomotive approaching the said crossing of said "B" street from the east.

That said building so obstructs said view for a great distance, to wit, eight hundred feet easterly from the said crossing of said "B" street.

Third. That on or about the first day of November, 1883, the defendant negligently caused and permitted to be left on that one of its said tracks on said Railroad street which is nearest to said building a number of box cars in such a position as nearly or quite to abut on to said crossing of said "B" street, which said cars so placed as aforesaid obstructed the view of any person approaching from the north on said "B" street to said railroad street of any car or locomotive approaching the said crossing from the east.

That such view was then and there so obstructed for a great distance, to wit, eight hundred feet from the said crossing of said "B" street.

Fourth. That on or about the said first day of November, 1883, and while the said building and the said cars were standing as aforesaid and obstructing said view as aforesaid the plaintiff approaching from the north attempted to cross the said Railroad street on said "B" street. That at the time he attempted to make said crossing the plaintiff could not see nor hear, and did not know that there was any car — locomotive on the east of said crossing and approaching from that direction within a great distance, to wit, eight hundred feet, and while the plaintiff was so crossing as aforesaid and was on said B street and without having any knowledge of any locomotive or car being and approaching on the said east side of said B street, the defendant without giving any warning whatever,
negligently caused to be rapidly pushed by a locomotive at-
40 tached thereto a train of cars down said Railroad street from
the East to and across said B street, and the foremost of said
cars in crossing said street without any fault of the plaintiff collided with the carriage in which the plaintiff was then riding, by which collision plaintiff was thrown upon the ground with great violence, thereby receiving great physical and mental injuries from which he will never recover.

Fifth. That plaintiff has expended a large amount of money, to wit, three hundred dollars, in the employment of physicians and surgeons and the purchase of medicines in endeavoring to be cured of said injuries, and by reason of said injuries the plaintiff is still put to great expense in securing medical service, attendance, and medicines, and by reason of said injuries he will always be compelled to be at great expense to secure such services, attendance, and medicines.

Sixth. That at the time of receiving said injuries the plaintiff was a carpenter and joiner and competent and able to work at said employment, but ever since said injuries and by reason thereof he has been and always will be unable to work at his said trade or to engage in any other mental or physical employment or in any manner to earn his livelihood.

Seventh. That by reason of said injuries and the money thereby expended in endeavoring to be cured as aforesaid and the pain and mental anguish the plaintiff has endured and will be compelled to endure by reason of said injuries and by reason of his said disability to support himself by his said trade or otherwise, the plaintiff is damaged in the sum of twenty-five thousand dollars.

41 Wherefore plaintiff prays judgment against the said defendant in the sum of twenty-five thousand dollars and for costs of suit.

T. S. ROADMAN,
J. STUART WILSON,
ANDREWS & JONES,
Attorneys for Plaintiff.

TERRITORY OF WASHINGTON, }
County of Spokane, } *ss:*

James Holmes, being first duly sworn, deposes and says that he is the plaintiff named in the above-entitled action; that has he heard the foregoing amended complaint read, knows the contents thereof, and believes the same to be true.

JAMES HOLMES.

Subscribed and sworn to before me February 6th, 1885.

W. R. ANDREWS,
Notary Public, Washington Territory.

Received a true copy February 6th, 1885.

JAMES McNAUGHT,
Att'y for Defendant.

Filed Feb'y 6th, 1885.

A. REEVES AYRES, *Clerk.*

42 In the District Court Holding Terms at Cheney, Spokane County, Washington Territory.

JAMES HOLMES, Plaintiff, *vs.* NORTHERN PACIFIC RAILROAD COMPANY, Defendant.	Demurrer to Amended Complaint.

Now comes the defendant, Northern Pacific Railroad Company, and demurs to the amended complaint of said plaintiff, and for cause of demurrer assigns, first, that said complaint does not state facts sufficient to constitute a cause of action.

McNAUGHT, FERRY, McNAUGHT &
MITCHELL,
Attorneys for Defendant.

Endorsed: In the district court, judicial district, holding terms at Cheney, Washington Territory. James Holmes, plaintiff, *vs.* Northern Pacific R. R. Co., defendant. Demurrer. Filed April 8th, 1885. Kate W. Feuerbach, clerk, by R. Strobach, deputy.

43 In the District Court Holding Terms at Cheney, Spokane County, Washington Territory.

JAMES HOLMES, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.
} Amended Answer of Defendant.

The defendant, for amended answer to plaintiff's amended complaint, alleges:

I.

It denies that at all times mentioned in said amended complaint the defendant was operating a railroad known as the Northern Pacific railroad in and through the city of Sprague, in Lincoln county, Washington Territory, but admits that said defendant has been operating its road through said city of Sprague since November 23rd, 1883.

II.

It denies each and every allegation contained in paragraph No. 2 of said amended complaint, except the allegation that said defendant caused to be erected and still maintains a large building fronting one of its tracks in said town of Sprague.

III.

It denies each and every allegation in the third paragraph of said amended complaint, except that on the first day of November, 1883, the defendant permitted to be left on one of its tracks in said Sprague, nearest to said building, cars.

44 IV.

It denies each and every allegation in the 4th paragraph of said amended complaint except the allegation that on the first day of November, 1883, and while the said building was standing near said track as aforesaid, plaintiff attempted to cross said railroad, and that while said plaintiff was crossing said railroad said defendant caused a locomotive attached to a train of cars to be pushed down said railroad, and that the foremost of said cars collided with the carriage in which the plaintiff was then riding.

V.

That as to the allegations in the 5th paragraph of said amended complaint said defendant has not any knowledge or information sufficient to form a belief.

VI.

It denies each and every allegation contained in the sixth paragraph of said amended complaint except the allegation that at the time of the collision aforesaid said plaintiff was a carpenter and joiner.

VII.

It denies each and every allegation contained in the 7th paragraph of said amended complaint.

And for further answer and defense defendant avers:

That the places where the cars mentioned in plaintiff's amended complaint were left standing on the track of the defendant and where said collision occurred were within the switch and car yard of the defendant, and that prior to the time of the collision mentioned in said plaintiff's amended complaint defendant, in its usual course of business, was running its trains at all hours over said place, and that said plaintiff, with full knowledge of the situation and danger at the said place where said collision occurred, 45 carelessly and negligently drove the carriage which collided with said train upon the track of said defendant and without stopping, looking or listening, or taking any steps whatever to ascertain whether a train was approaching or not, and the collision mentioned in plaintiff's amended complaint and the injuries which plaintiff sustained thereby were caused by the fault, carelessness, and negligence of said plaintiff and not by any fault, carelessness, and negligence of the defendant.

Wherefore defendant prays that plaintiff take nothing by his action herein, and that defendant go hence without day and have and recover its costs and disbursements in this action.

McNAUGHT, FERRY, McNAUGHT &
MITCHELL AND
CATON & STANFORD,
Attorneys for Defendant.

TERRITORY OF WASHINGTON, }
County of Spokane, } *ss:*

James McNaught, being first *f*uly sworn, on oath says that he is one of the attorneys for the defendant named herein; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true; that he makes this affidavit for the reason that there is no other officer or agent of said defendant now in said county of Spokane who can legally make this affidavit.

JAMES McNAUGHT.

Subscribed and sworn to before me this 15th day of April, 1885.

A. C. BOWMAN,
Notary Public in and for said Territory.

46 Received copy April 15, 1885.

W. R. ANDREWS,
Of Counsel for Plaintiff.

(Endorsed:) 561. James Holmes *vs.* Northern Pacific Railroad Co. Answer. Filed April 13, 1885. Kate W. Feuerbach, clerk, by R. Strobach, deputy.

47 In the District Court of Washington Territory and for the Fourth Judicial District Thereof, Holding Terms at Cheney.

JAMES HOLMES, Plaintiff, *vs.* NORTHERN PACIFIC RAILROAD COMPANY, Defendant.	Reply.

The plaintiff, replying to the further answer and defense set out in the defendant's amended answer, denies each and every allegation in said defense.

J. STUART WILSON,
ANDREWS & JONES,
Att'ys for Plaintiff.

TERRITORY OF WASHINGTON, } *ss:*
County of Spokane, }

James Holmes, being first duly sworn, deposes and says that he is the plaintiff named in the above-entitled action; that he has heard the foregoing replication read, knows the contents thereof, and believes the same to be true.

JAMES HOLMES.

Subscribed and sworn to before me April 16th, 1885.

H. W. KNOX,
Notary Public, Washington Territory.

(Endorsed:) 561. James Holmes *vs.* Northern Pacific Railroad Company. Reply. Filed April 16, '85. Kate W. Feuerbach, clerk, by R. Strobach, deputy.

48 Adjourned Term, November 13th, 1886.

JAMES HOLMES, Plaintiff, *vs.* THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.	No. 561. Verdict of Jury.

And now comes the jury into open court and the plaintiff being present, by his attorney of record, and the defendant's attorneys of record being present, and the roll of the jury being called by the clerk, and all answering to their names, returned into court the following verdict:

"We, the jury in the case of James Holmes, plaintiff, against The Northern Pacific Railroad Company, defendant, find for the plaintiff in the sum of ten thousand ($10,000) dollars.

ST. CLAIR INKSTER, *Foreman.*"

49 *Special Questions to Jury.*

1.

Had the plaintiff a knowledge of the crossing where the collision occurred?

2.

Did the plaintiff know at the time of said collision and prior thereto that said crossing was within the switching yard of defendant?

3.

If said crossing was within the switching yard of defendant, was the plaintiff in the habit of crossing at the point where the collision occurred at and prior thereto?

4.

Did the plaintiff know at and prior to the time of the collision that the defendant was in the habit of using said place of crossing and to the west of the same in the conduct of its business and run its trains to and fro over the same?

5.

How many times per day did the trains, including switching trains of defendant, pass over the crossing where the collision occurred?

6.

At what point was the west end of the west box car on the side track adjoining the depot building at the time of the collision?

7.

How many box cars were on the side track adjacent to the freight-house?

50 10.

For what purpose was the building called freight depot used at the time of the collision?

11.

Was it clear or cloudy on the day the collision occurred?

12.

Was it calm, windy, or boist-rous on the day of the collision?

13.

At what distance from the place where the collision occurred could the noise of the train be heard if the bell was not rung?

14.

Did the noise of the teams and wagons of Fish and Breslaun and plaintiff's own vehicle interfere with plaintiff's hearing the bell, if any bell was sounded?

15.

Did the noise of the said wagons and teams interfere with the hearing of the rumbling of the train with which he collided?

16.

At what distance from the place where the collision occurred could the plaintiff have heard the rumbling of the moving train if he had stopped and listened after the wagons of Fish and Breslaun had passed over the crossing?

51 17.

Had the plaintiff stopped and listened at the point where he said he listened, could he have heard the ringing of the bell, if any bell had been sounded, nothwithstanding the noise of the teams crossing said track immediately prior to the collision?

18.

At what rate of speed was the train which collided with the plaintiff's vehicle, prior to and at the time of said collision, moving?

23.

How far east of the place where the collision occurred is the point where the train stopped whilst going east, reversed and commenced running back towards the place where the collision occurred?

24.

At what rate of speed was said train running at the time of said collision?

26.

How many drinks of whisky had the plaintiff taken on the day of and before the collision, and was the plaintiff at all affected by the whiskey he had taken at the time of the accident?

27.

Did the plaintiff or not when sixteen feet from the track at the crossing on which the colliding train ran have an opportunity of seeing the approaching train? If so, was the view free and complete or partial? State how much of the train he could see at that distance.

52 28.

Could the plaintiff or not have stopped fifteen feet from the track at the crossing on which the colliding train was moving, and by so stopping have avoided the collision?

30.

Had the plaintiff looked in the direction which the train that collided with his carriage came when within forty feet of the place where the collision occurred, — have seen the approaching train, "if the train was then approaching," if said train was within a distance of seventy feet of said crossing?

31.

Could the plaintiff, when he was at a distance of fifty feet from the place where the collision occurred, have seen the approaching train, " if it was then approaching," if it was at any place within eighty feet of the place said collision occurred?

33.

Was the plaintiff, as he was approaching the place where the collision occurred, warned of the approaching train? If so, by whom? If he was so warned did he hear the warning?

34.

Had the plaintiff been exercising reasonable caution and care in approaching the crossing, would he have heard what Fish and Peterson said to him?

35.

Did the plaintiff know that the train, with which his carriage subsequently collided, previous to the collision had passed to the east from the place where the collision occured?

53 36.

Did he know that this train with which the collision occurred was a switching train, or was it his impression that the train he had first seen moving towards the east was a switching train?

38.

Could the plaintiff have avoided the collision by stopping to listen?

39.

Was the bell ringing at the time the train was backing down towards the crossing continuously and at the time of the collision?

40.

Did the yardmaster or any one else, just prior to the collision, make any motions at the time when the plaintiff was approaching the place where the collision occurred; and, if so, where was such person standing, and was there anything to prevent the plaintiff seeing said motions; and, if so, what?

41.

Did the plaintiff see said motions, and if he did not, if he had been exercising reasonable care and caution could he have seen said motions?

42.

Did the plaintiff Holmes at any time he was approaching said place where said collision occurred have reason to expect that the switch or any train might pass over the crossing where the collision occurred at any moment?

43.

At what rate of speed was Holmes' team traveling as he approached the place where the collision occurred while his
54 horses were trotting?

44.

At what rate of speed was Holmes' team traveling as he approached the place where the collision occurred while his horses were walking, and what distance did said horses walk?

45.

Did the plaintiff stop his team shortly before reaching the place where the collision occurred; if so, at what distance from said place and for what length of time? If plaintiff did not stop his team, did he check his team and slow up before reaching the place of collision?

46.

If the crossing at which this collision occurred was within the switching yard of the defendant, was the said crossing a public highway?

47.

When the plaintiff was at a point 100 feet of the crossing where the collision occurred, for what space between said point and said crossing and what distance from said crossing was the view of said train obstructed?

Endorsed: No. 561. Filed Nov. 13, 1885. D. A. Clement, clerk.

55 *Answers to Special Questions.*

We, the jury, in the case of James Holmes, plaintiff, against the Northern Pacific Railroad Company, defendant, upon the particular questions of fact submitted to us by the court for our findings, which questions, numbered from 1 to 47 inclusive, are hereto attached, find in reference to said questions as follows:

To the first question.
To the second question.
To the third question.

Questions.

No.	1st	answer.	Yes.
"	2d	"	Yes.
"	3rd	"	Yes.
"	4th	"	Yes.
"	5th	"	An indefinite number of times.
"	6th	"	Impinged on plank crossing 2 to 5 ft.
"	7	"	Three.
"	10	"	Receiving and discharging freight.

No. 11 answer. Clear day.
" 12 " A little breeze.
" 13 " From 50 ft. to 200 ft., in our judgment.
" 14 " Yes, we think it would.
" 15 " Yes, " " " did.
" 16 " We judge from 100 to 400 ft.
" 17 " He could.
" 18 " Between 6 and 10 miles an hour.
" 23 " 140 ft. east.
" 24 " About 6 miles an hour.

56

No. 26th answer. 5 or 6 drinks during the day. We have no evidence to show that he was affected.
" 27th " Yes, a partial view, could see one corner of caboose.
" 28 " He could not, to the best of our judgment.
" 30 " No.
" 31 " We think he could not, before the filling in or grading of said street.
" 33 " Yes, by Fish and Peterson. We think he did not hear the warning.
" 34 " Under the circumstances, we think not.
" 35 " Yes.
" 36 " We think it was his impression that it was a switching train.
" 38 " Yes, if he had stopped at a safe distance.
" 39 " We believe from the evidence it was not ringing continuously while backing down or at time of collision.
" 40 " The person standing at the switch did make motions for the train to back down. There was nothing to obstruct the view of plaintiff of seeing those motions.
" 41 " He did not. We think he may have been using reasonable care and caution, and still not have seen the motions.
" 42 " At the time he approached the crossing, and seeing the train going east, he had no reason to suppose it would return so soon.

57 No. 43 answer. About 5 miles an hour.
" 44 " At the rate of 4 miles an hour, his horses walked about 25 or 30 feet.

No. 45 answer. No, he did not stop his steam. Yes, we think he did slow up his team.
" 46 " Yes; it was.
" 47 " Judging from our own observations since the grading or fill in the street since the time of the accident, we think there was a space of twenty or twenty-five feet that the plaintiff could not have seen the train after it had

passed east over the crossing, and that space was at a point about 45 to 50 ft. from the place of accident north of crossing.

ST. CLAIR INKSTER, *Foreman.*

Endorsed: No. 561. James Holmes *vs.* N. P. R. R. Co. Answers to particular questions. Filed November 13, 1885. D. A. Clement, clerk.

58 Adjourned Term, November 13th, 1885.

JAMES HOLMES, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.
} Exceptions to Answers to Special Questions.

Defendant, by its attorneys, excepted to the answers to the following-numbered questions, viz:

Numbers five, thirteen, eighteen, twenty-six, twenty-eight, thirty, thirty-one, thirty-four, thirty-nine, forty-one, forty-two, and forty-seven.

Which said exceptions were allowed.

59 In the District Court, Holding Terms at Cheney, Spokane County, Washington Territory.

JAMES HOLMES, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.
} Motion for Judgment.

Now comes the defendant, by its attorneys, James McNaught and Hyde & Turner, and move the court to enter judgment for the defendant upon the special findings herein.

JAMES McNAUGHT,
HYDE & TURNER,
Attorneys for Defendant.

Endorsed: James Holmes *vs.* Northern Pacific Railroad Company. Motion for judgment. Filed Nov. 16, 1886. D. A. Clement, clerk.

60 Adjourned Term, November 17, 1885.

JAMES HOLMES, Plaintiff,
vs.
N. P. RAILROAD COMPANY, Defendant.
} No. 561. Motion for Judgment for Defendant Overruled.

And now this cause coming on for hearing on the defendant's motion for judgment for the defendant, notwithstanding the general verdict, and the court having had the said motion under advisement:

It is ordered that the said motion be, and the same is now hereby, overruled; to which ruling of the court the defendant, by its attorney, excepts, and the exception is by the court allowed.

61 Adjourned Term, November 17, 1885.

JAMES HOLMES, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. } Judgment on Verdict.

And now, on this day, this cause coming on for hearing upon the plaintiff's motion for judgment on the verdict entered herein on the 13th day of November, and being fully advised in the premises, it is considered and adjudged that the plaintiff, James Holmes, do have and recover of and from the defendant, Northern Pacific Railroad Company, ten thousand dollars, with interest at the rate of ten per cent. per annum from this date until paid, together with his costs and disbursements in this behalf expended, taxed at $— *dollars*, and that execution issue therfor.

GEORGE TURNER,
Judge of said Court.

62 In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at Cheney, Spokane County.

JAMES HOLMES, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. } Notice of Appeal.

To the clerk of the above-named court and to the plaintiff, James Holmes, and his attorneys:

You and each of you are hereby notified that the Northern Pacific Railroad Company appeals and prosedutes a writ of error to the next regular term of the supreme court of Washington Territory, which said term commences on Monday, the 12th day of July, A. D. 1886, from the judgment entered and made in the above-entitled case and court on the 17th day of November, A. D. 1885, particularly described as follows, to wit, a judgment in favor of the plaintiff, James Holmes, for the sum of ten thousand dollars and costs against the Northern Pacific Railroad Company for damages for personal injuries to said Holmes by said defendant, which said judgment was entered in the judgment record of said court on the 17th day of November, A. D. 1885, and which judgment is in the words and figures following:

In the District Court for Washington Territory and for the Fourth Judicial District Thereof, Holding Terms at Cheney, in Spokane County.

JAMES HOLMES, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

And now, on this day, this cause coming on for hearing upon

plaintiff's motion for judgment on the verdict entered
63 herein on the 13th day of November, and being fully advised in the premises, it is considered and adjudged that the plaintiff, James Holmes, do have and recover of and from the defendant, Northern Pacific Railroad Company, ten thousand dollars, with interest at the rate of ten per cent. per annum from this date until paid, together with his costs and disbursements in this behalf expended, taxed at —— dollars, and that execution issue therefor.

GEORGE TURNER,
Judge of said Court.

November 17, 1885.

That this appeal and writ of error is taken from each and every part of said judgment and each and every order, ruling, and decision made in said cause.

Description of Errors.

The Northern Pacific Railroad Company, for a particular description of errors assigned, avers and assigns—

I.

The overruling of the demurrer to the amended complaint and the reason that the said complaint does not state facts sufficient to constitute a cause of action in this, that it does not aver either a custom or duty of the defendant to ring the bell or give other warning of trains approaching the place where the collision occurred and does not aver that the defendant was guilty of any actionable negligence.

II.

Error of the court in instruction and directing the defendant's counsel not to interrogate any of the jurors as to their relation to plaintiff's counsel, and especially as to whether any of said jurors were clients of plaintiff's attorneys, for the reasons (1) that
64 the defendant was entitled to said information to enable it to show, with other facts, actual bias of the juror; (2) so as to enable defendant to exercise its peremptory challenges intelligently; (3) if the relation existed it was a ground of challenge for implied bias in permitting W. R. Skelton, over the objection of defendant, to answer the following question: State whether or not there was such a highway in Sprague at that time as B street, for the reasons—

I. The existence of B street was in issue, and the question is leading.

II. It calls for the conclusion of the witness.

III. It is attempting to prove by oral evidence the existence of a street.

IV.

In permitting W. R. Skelton, over the objection of defendant, to answer the following question, "Now state whether or not you did hear the bell ring," for the reasons:

I. The question is immaterial.

II. The question should have been, Was the bell rung as the train approached the crossing?

V.

In permitting James Holmes to answer, over the objection of the defendant, the following question, "How long after you could have seen the car was it you did see it?" for the reasons:

I. The question called for the conclusion of the witness.

II. He should have been asked to state the facts.

VI.

Plaintiff's counsel propounded the following question: "Did
these teams that were crossing over the planking and crossing and
the tracks there make any noise?" To which the plaintiff, James
Holmes, made the following answer: "Well, any teams will
65 make a noise on the planking, but they were not making so
much noise that I could not hear the ringing of the bell."
And the court overruled the objection; to which ruling defendant's
counsel then and there excepted, for the reasons:

I. That the witness should have stated the facts and let the jury judge of the effect of the noise.

II. The answer is not responsive.

VII.

In permitting witness T. Smith to answer the following questions over defendant's objection, "What is your impression now as to whether the bell was ringing at the time?" for the reasons:

I. Impressions are not evidence.

II. The question should have been not what his impressions were, but was the bell rung.

VIII.

In not permitting George R. Blackwell to answer the following questions, "State, as near as you can, how far switch-train, running as switch-trains run in that yard, can be heard, supposing the train in good condition," for the reasons:

I. Experienced railroad men are better judges than ordinary jurors as to the matters interrogated concerning.

II. Blackwell was accustomed to that yard and could speak from experience.

III. The matter is not, as ruled by the court, within the common observation of all people.

IX.

The court erred in not permitting the following question to be
answered by A. Wisnard, M. D., "Wisnard, with a train running
five miles an hour on a calm day, composed of the cars I
66 have mentioned, to wit, caboose, two flat and two box cars,
and engine, in passing over a frog how far could that train
be heard?" for the reason last above stated.

X.

The defendant asked of S. Ladd, an engineer, the following question: "How fast do switch-trains run in that yard, Mr. Ladd; what is their variance, what would be the greatest rate of speed in the yard, and the usual rate of speed in the yard?" To which question plaintiff's counsel made the following objection: "We object. Our objection is that it does not make any difference what the usual rate of speed was. Witnesses have all testified to the ra-e of speed on that occasion. Their witnesses have none of them placed it over five miles an hour. I do not wish to have any contention, but if they were to show a rate of speed that would be dangerous to human life or limb I think it would be improper to show it. They have no right to show a custom that is dangerous to anybody, especially on a highway." "Court: Objection sustained."

We assign that ruling as error for the reasons:

I. The testimony shows that the plaintiff was acquainted with that switch-yard and of necessity knew the rate of speed that trains ran therein. He was bound to approach the crossing, when the view was partially obstructed, with caution proportioned to the danger.

II. The place where plaintiff was crossing was through the switch-yard of the defendant. Plaintiff was bound to exercise such care and caution as would enable him to avoid the switch-trains in that yard running at the usual rate of speed.

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XI.

In not permitting S. Ladd, an engineer, to answer the following question, "State, Mr. Ladd, what distance the train running at the rate of five or six miles an hour, where it is passing over a frog, on an ordinarily calm day, could be heard," for the reason—

I. That Ladd was an experienced railroad man and testified to this matter as an expert.

II. The matter interrogated concerning was not within the common observation of all people.

XII.

In permitting W. R. Skelton, a witness for plaintiff, to answer, over the objection of the defendant, the following question, "Were you standing in a position at the time the accident occurred that you could have seen a person at the west end of the caboose at the time it was approaching the crossing?" for the reason—

I. The question is immaterial.

II. Asks for an opinion as to things possible and not what actually occurred.

XIII.

In permitting the plaintiff Holmes to answer, over the objection of defendant, the following question, "What was your condition at the time with reference to being sober or drunk or intoxicated?" for the reasons—

I. The question in issue was not whether the plaintiff was sober or drunk or intoxicated, but whether the liquor drunk by him on that day affected his hearing and seeing.

II. The question asked for his opinion and not for the facts.

III. Incompetency.

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XIV.

That the court erred in overruling defendant's motion for nonsuit, for the reasons:

I. That the evidence adduced on behalf of the plaintiff shows contributory negligence, in this, that it shows that the noise of the approaching train could have been heard by plaintiff at least 200 feet from the place where the collision occurred.

II. That the plaintiff was warned of the approaching train in time to avoid the collision by Fish and Peterson.

III. That the plaintiff did not look for the approaching train.

IV. That he did not listen.

V. That plaintiff knew that the place where the collision occurred was within the switch-yard and that the train was working at that time in the yard; that plaintiff knew the location of the switches and was bound to know that the train might reverse at the first switch east of the crossing and reach the place of collision at the time it did.

VI. The testimony of the plaintiff shows that he had been drinking on that day.

VII. The testimony of the plaintiff shows that the colliding train was running at usual rates and times at the time of the collision.

XV.

The court erred in giving the following instructions to the jury, to wit: Upon the question as to whether the defendant by its servants pushed its train down upon the plaintiff with such speed as to constitute that an act of negligence, and as to whether the defendant failed to give warning of the approach of its train and was guilty of negligence therein, I instruct you that the defendant was bound to use such care in pushing its trains over 69 public highways in the town of Sprague as men of common prudence and intelligence would ordinarily use under like circumstances, taking into consideration the frequency with which the crossings were used by the public, the difficulties by reason of the situation and surroundings of the crossing in avoiding collisions, and the results likely to ensue from collision, and that the absence of such care by the defendant in this case would make the defendant guilty of negligence for which the plaintiff may recover if he was injured thereby," for the reason—

1. That there was no evidence as to whether the speed of the train was unusual or unsafe or such as to constitute negligence.

2. It was error to instruct the jury that the defendant was bound to exercise such care as the jury might think that men of common prudence and intelligence would ordinarily use, but should have

instructed the jury that the defendant was bound to exercise such prudence and intelligence as experienced railroad operators would exercise.

XVI.

The court erred in giving instruction number three, which reads as follows: "What would be a rate of speed that a man of common prudence and intelligence would feel to be a safe one at the particular time and place when and where this accident occurred, and whether the train of cars was pushed at such a rate at the time of the accident, as well as the question whether a man of common prudence and intelligence would deem it safe to push a train of cars with a locomotive at said time and place without giving warning of the approach of the train by ringing the engine bell or blowing the engine whistle, or by some other adequate means, and whether
70 such warning was given, are questions of fact for you to determine from the evidence in this case," in the following particulars:

1. That the rate of speed should have been such as you find by experienced railroad men to be safe, and not what a man of common prudence might deem safe.

2. In submitting to the jury that they might consider the question as to whether other warning than ringing the bell was given.

3rd. In submitting the question of rate of speed to the jury.

XVII.

The court erred in the sixth instruction in submitting the question to the jury as to whether the place where the collision occurred was a public highway; in instructing the jury that if the same had been used as a public highway for a number of years and that the defendant, by grading, laying down planking, and other acts indicating its nature as a crossing, held it out to the public as such, then the jury would be justified in finding the crossing was a public highway, for the reasons—

1. That the record proof introduced by the plaintiff showed that the place where the collision occurred was reserved by the defendant for its exclusive use.

2. The evidence was insufficient to show a dedication.

XVIII.

The court erred in giving the following instructions:

(8.) If, however, the witnesses who testified differently to the same facts are all of them of equal candor, fairness, intelligence, and truthfulness, and equally well corroborated by all the other evidence, and are upon an equal footing as to interest in the result of the suit, then the preponderance of evidence as to that fact would be
71 determined by the number of witnesses, for the reason—

1. The instructions ignores the fact that some witnesses might testify positively and affirmatively and others doubtfully and negatively.

2. That the word "intelligence," as used therein, should have been limited to intelligence concerning the particular matter testified to.

3rd. It should have included equal experience.

XIX.

The court erred in giving instructions No. 10 in the following particulars:

1. In confining negative testimony to one who testifies that at a certain time and place he did not see or hear such things.

2. In classifying as positive testimony all witnesses who testified that they looked for a certain thing, having the means to see, and that it did not occur.

3. Instructing the jury that all positive testimony was entitled to same weight.

XX.

The court erred in giving the jury the 15th instruction, which is as follows: "Greater care would be required of him if he knew that a train was then approaching the crossing or about to approach than if the contrary were the fact. The rights, duties, and obligations of railroads and travelers upon intersecting highways are mutual and reciprocal, and no greater degree of care is required of the one than the other. The railroad train has the right of precedence in crossing, but this right does not impose upon the traveler in a wagon the whole duty of avoiding collisions. It is accompanied with and conditioned upon the duty of the train to give due and timely
72 warning of approach. The duty of the wagon to yield precedence is based upon this condition. Both parties are charged with a mutual duty of keeping a careful lookout for danger, and the degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty," for the reasons—

1. In instructing the jury that the duty of the plaintiff to look and listen was dependent and conditioned upon the ringing of the bell by the defendant as the train approached the crossing.

2. In instructing the jury that negligence of the defendant justified or excused the plaintiff's negligence.

3. In not instructing the jury that the plaintiff was bound to look and listen regardless of any conduct on the part of the defendant.

XXI.

The court erred in giving instructions No. 17, which reads as follows: "If at any time before the plaintiff put himself across the track of the approaching train he was in a position he could have seen the train moving toward the crossing well enough to understand its movements and to avoid collision with it, but carelessly drove across the track without looking to ascertain its movements, then he was guilty of contributory negligence, which would prevent him from recovering in this action," for the reason—

1. If the plaintiff could see the train he was bound to ascertain its movements before attempting to cross the track.

2. In not qualifying the instruction so as to make it the duty of the plaintiff in crossing the track in defendant's switch-yard to avoid switch trains running at the usual rates.

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XXII.

The court erred in giving the 18th instruction, which read- as follows: "The testimony of the plaintiff that he started in his carriage from White's saloon, a place some two hundred or more feet from the place of crossing, in order to drive over the crossing. The defendant claims that the plaintiff could have seen the moving train at all places between White's saloon and the immediate vicinity of the crossing. You will recall the testimony on this subject and recollect the observations made by you on the ground and determine what the fact is. If the train was moving toward the crossing at the time when the plaintiff drove down from the saloon to the crossing and the plaintiff could have seen it so moving if he had looked and he carelessly failed to look, then the fact that his view was obstructed at the point of immediate crossing does not relieve him from the consequences of his failure to look when he might have looked, he would not be entitled to recover," for the reasons—

1. The court instructs the jury to consider the observations made by them on the ground and determine the facts from such observations and the evidence.

2. In qualifying the words "failed to look" by adding the word "carelessly."

XXIII.

The court erred in giving the 20th instruction, which reads as follows: "Unless the plaintiff has shown by his own evidence that he was guilty of contributory negligence, then the burden of showing such contributory negligence is on the defendant, and it must be shown by the defendant to the same extent that plaintiff is required to show the alleged negligence of defendant."

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XXIV.

The court erred in instructing the jury that they could allow for mental anguish as a separate element distinct from bodily pain.

XXV.

The court erred in giving the first instruction, which reads as follows: Asked by plaintiff: "No particular form or ceremony is necessary in the dedication of land for a public highway. All that is required is that the owner shall in some manner manifest an intention to dedicate it and that the public shall accept the dedication."

XXVI.

The court erred in giving the following instructions asked by plaintiff, which reads as follows: “No. 6. And when a party is compelled to choose upon the instant as to the proper or safe course to pursue in order to avoid a threatened hazard, the fact that his choice may have been a mistaken one will not prove contributory negligence on his part or deprive him of his remedy.”

XXVII.

The court erred in refusing to give instruction No. 2, asked by the defendant, to wit: “If it appears from the evidence that the plaintiff is not entirely free from any degree of negligence which contributed to the injury, then the plaintiff cannot recover in the case, notwithstanding you may find that the defendant is guilty of some degree of negligence which contributed to the injury.”

XXVIII.

The court erred in refusing to give the 7th instruction asked by defendant, which reads as follows:

“Every person is bound to know that a railroad crossing
75 is a dangerous place, and he is guilty of negligence unless he
approaches it as if it were dangerous. If you find from the evidence that the plaintiff was acquainted with the place where the collision occurred and also find that said place was within the switching yard of the defendant, and also find that the defendant did not have a regular time for switching in said yard, or was moving its trains at any time whenever business required therein, and the plaintiff knew such to be the practice of the defendant, when the plaintiff was bound to know that a train might be approaching at any time, and if he attempted to cross said track without ascertaining whether one was coming or not, but on the contrary drove directly into the track and the collision resulted, he was guilty of contributory negligence and cannot recover in this action.”

XXIX.

The court erred in refusing to give the 8th instruction asked by defendant, which reads as follows: “It is not the exercise of ordinary care and prudence for a person to drive a team directly on to a railroad crossing known to him at the time to be dangerous, without making any effort, by stopping and listening or otherwise, to ascertain whether a train is approaching or whether it is safe.”

XXX.

The court erred in refusing to give instruction No. 3 asked by defendant, which reads as follows: “If there was any negligence on the part of the defendant and plaintiff which contributed in any degree to the accident, then the jury had no right to strike a balance between them so as to find a verdict for the plaintiff, but in such case you must find for the defendant.”

76

XXXI.

The court erred in refusing to give the 9th instruction asked by defendant, which reads as follows: If you find that the building called depot mentioned in the pleadings and the cars on the track adjacent thereto so obstructed the view of the plaintiff that he could not see the train this fact called him to greater care and watchfulness in driving upon the track than if the view was open; and if in the exercise of ordinary care and vigilance the plaintiff could have heard the noise of the coming train and then drove upon the track without first fully ascertaining that there was no danger of collision, then he was guilty of negligence and cannot recover in this action.

XXXII.

The court erred in refusing to give the 17th instruction asked by defendant, which reads as follows: "And I further charge you that if you find from the evidence that the defendant's servants or servant did ring the bell of the engine moving the train which collided with plaintiff's carriage before said collision while said train was at a distance sufficient to enable plaintiff to have stopped his team and avoided the collision, and the plaintiff failed so to do, either for the reason that he did not hear the bell ring or hearing did not heed it, then you will find for the defendant in this case."

XXXIII.

The court erred in refusing to give the 20th instruction asked by defendant, which reads as follows: The defendant claims that there is evidence tending to show that the train was running so slow that the caboose which collided with the plaintiff's carriage did not
move more than 25 feet after the collision and that said train
77 at said time of collision was not running to exceed 6 miles
per hour; and if you find that the train did stop within 25 feet after the collision, and that it was not running at the time of said collision at a greater speed than six miles per hour, then you will find that the defendant was not guilty of negligence in running its train at too great a rate of speed."

XXXIV.

The court erred in refusing to give instruction number 22 asked by defendant which reads as follows: It is shown by the evidence and not disputed that the plaintiff was accustomed to pass this crossing and may be presumed to know and be acquainted with the usual rate of speed with which trains passed this crossing, and if this train was not moving at a greater rate he should be held as bound to exercise such care and caution as to avoid collision with such train moving at usual rates, so that unless you find that the train was moving at an unusual and unreasonable rate of speed you would be warranted in finding that the plaintiff was guilty of negligence, contributed to the injury, and hence not entitled to recover.

XXXV.

The court erred in refusing to give the 23rd instruction asked by defendant, which reads as follows: "Common prudence and common caution require every person approaching a railroad crossing if he knows of it and has reason to expect a train to pass, and especially if he does expect a train to pass, to pause and see if he can cross in safety, and if there be any danger at all he is bound to wait until it is past, and although there may be much practice to the contrary, still if he did not do this he does not exercise either common prudence or common caution. Hence if you find
78 from the evidence that the plaintiff knew the crossing and had no reason to believe that a train would soon pass or that he knew that a train was soon to pass, and he did not stop to look and listen for the purpose of ascertaining whether he could cross with safety, he is guilty of negligence contributing directly to the injury of which he complains, and you should find a verdict for the defendant.

XXXVI.

The court erred in refusing to give the 26th instruction asked by defendant, which reads as follows: If you find from the evidence that the bell of the locomotive was ringing at the time plaintiff approached the crossing, and that the train was not running faster than six miles per hour, you should find a verdict for the defendant.

XXXVII.

The court erred in refusing to give the 29th instruction asked by defendant, which reads as follows: If you find from the evidence that the plaintiff was acquainted with the place where the collision occurred at the time thereof, and that he knew that the same was within the switching yard of the defendant, and that the defendant in the usual course of its business was liable to run switching and other trains over said place of collision at any time, then the plaintiff in approaching said place where said collision occurred was bound to expect that a train might approach and cross the same at any moment, and if the plaintiff approaching the place of said collision with such knowledge at the time when his view was obstructed and when there was some noise so that he could not
79 hear the rumbling of the approaching train without stopping to listen and failed to stop to listen, then the plaintiff has been guilty of contributory negligence and your verdict should be for the defendant.

XXXVIII.

The court erred in refusing to give instruction No. 39 asked by defendant, which reads as follows: Plaintiff concedes that he had been drinking intoxicating liquors on the day of and prior to the accident, and there is evidence tending to show that warning was given the plaintiff by Fish and Peterson at a time when plaintiff was but a short distance from the place where the collision occurred

and that the plaintiff paid no heed to said warning, but it is claimed by the plaintiff that he did not hear said warning, and it is claimed by the defendant that he did not hear them because his sense of hearing was dulled by the amount of liquor he had drank that day. If you find such to be the fact, then I charge you that the plaintiff because of said dulness of hearing was bound to exercise greater care and caution in looking and listening for said approaching train than if he had not been drinking. By common observation we know that it is difficult for one who has been drinking to tell to just what extent his sense of hearing is dulled by said drinking, and the fact that the plaintiff had been drinking is a circumstance for you to consider in determining the amount of care and caution he should have exercised in approaching the place where the collision occurred, and I leave it for you to determine, considering the fact if there was some temporary noise and the plaintiff's view was totally or partially obstructed and that he had been drinking, and all the other facts in this case, to determine whether or not it was the duty of the plaintiff to stop and wait until that temporary noise, if any
such there was then, had passed away before he attempted to
80 cross the track. If you find that in the exercise of reason-
able caution and care he should have done that under all the circumstances of the case, and it is conceded that he did not, then I charge you that your verdict should be for the defendant.

XXXIX.

The court erred in refusing to give the 40th instruction asked by defendant, which reads as follows: I further charge you that if you find that plaintiff's view of the approaching train was totally or partially obstructed as he approached the place where the collision occurred, that his opportunity of hearing the noise of said train was obstructed by the noise of the teams of Fish and Breslaun, and that the plaintiff's sense of hearing was dulled by the liquor he had been drinking on that day, and if you find that the plaintiff had reason to believe that a train might cross the place where the collision occurred at any moment, and that there are no other circumstances in this case to the contrary of the aforesaid enumerated circumstances, then it was the duty of the plaintiff to stop and listen for the coming train before going upon the track, and if he failed to do that—and it is conceded that he did—then your verdict should be for the defendant.

XL.

Error of the court in entering judgment for the plaintiff in this particular, that the general verdict is inconsistent with and contrary to the special verdict in this, that the jury in the special verdict find that the plaintiff could have seen and heard the coming train in time to have avoided the collision if he had looked and listened, and that he was warned by Fish and Peterson that the train was running at the time of the collision six miles an hour;
that it was a switch-train, that plaintiff knew it, running in
81 the switch-yard, and that he was acquainted with the yard.

XLI.

That the court erred in refusing to set aside the verdict and grant a new trial in the particulars set forth in the motion therefor.

XLII.

Error of the court in entering judgment for the plaintiff.

The clerk of said court is directed hereby to transmit to the supreme court of Washington Territory a transcript of all pleadings, bill of exceptions and notice of appeal, bond, judgment, and all record entries made in said cause and all other papers required by law to be transmitted.

JAMES McNAUGHT AND
HYDE & TURNER,
Attorneys for Defendant, Northern Pacific Railroad Company.

Endorsement: No. 561. In the district court, 4th judicial district, holding terms at Cheney, Washington Territory. James Holmes, plaintiff, *vs.* Northern Pacific Railroad Company, defendant. Notice of appeal. Filed March 9th, 1886. D. A. Clement, clerk. James McNaught and Hyde & Turner, attorneys for defendant.

82 In the District Court of the 4th Judicial District in Washington Territory, Holding Terms at Cheney, Spokane County.

JAMES HOLMES, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.
} Bill of Exceptions.

This cause coming on for trial in the district court holding terms at Cheney, Spokane county, the following proceedings occurred and constituted said trial:

1st. In the impanelling of the jury the defendant's counsel in interrogating the first juror as to his qualifications and fitness to act as a juror in said cause inquired of him as to whether or not he was a client of Andrews & Jones, counsel in said cause for the plaintiff; that then and there W. R. Andrews, one of said counsel of plaintiff, objected to said question. Defendant's counsel, James McNaught, informed the court that during his practice for fifteen years in the Territory he had never been refused permission by the court to ask such a question; but, on the contrary, in his practice he had been uniformly permitted to ask such questions—

(Endorsed on margin) on the ground that the relation of attorney and client between a juror and an attorney for either party was good ground of challenge for implied bias. The juror had not been nor was he afterwards challenged for implied bias nor any other cause.

The court sustained the objection; it was developed, however, that the juror was not a client of plaintiff's counsel, Andrews & Jones.

Andrews: And since the time of its location the public have traveled upon it constantly and used it as a public highway.

McNaught: They have used it as a public highway and also as a switch-yard for the purpose of making up its trains. We desire simply to save the point as we did before.

Court: If you gentlemen agree on the facts it is not necessary to rule upon it.

NcNaught: We desire to save an exception to the admission of the oral testimony to prove that that street is a highway.

Court: You can have an exception. I will overrule the objection.

Andrews: I will simply examine one witness as to the facts.

Q. When did you first go to Sprague?

A. I came to Sprague in April, 1881, I think.

87 Q. State whether or not there was such a highway in Sprague at that time as B street.

McNaught: I object to that as being improper and leading.

Court: I think that it is proper to suggest it, as it has so little to do with the merits of the case.

McNaught: We will except.

Exception allowed.

A. Well, these streets, this street in particular (indicating B street), was all laid out and being used as public streets when I came to Sprague—crossing backwards and forwards over it from the north to the south side of the town.

Q. Well, state as to their being used by the public generally.

A. Yes; they were used generally.

Q. Do you know who placed the planking upon the crossing there?

A. I think the company did it. I saw company men at work at it.

Q. Well, now, at the time of the accident, if one did occur, which is not disputed here, at the time of the accident state whether or not that street was used at that time.

A. It was. It was more the public street than the other (referring to B street). The road came along down this street—down here. All this country over north came in that way and a great many came in this way (indicating) and across.

Q. Then how about its being the principal thoroughfare in that town?

A. Well, it was. It was generally more used than any other street here, being the business —, and the principal business being located on this street south.

Q. At the time of this accident do you know what the population of Sprague was?

A. I do not exactly know. I should judge about eight or nine hundred.

88 Q. Now, state, Mr. Skelton, whether or not you witnessed an accident, in which the plaintiff here took a part, on the first of November or about that time.

A. I saw the accident.

Q. Now, relate to the jury just how it occurred, as you saw it, and commence with the time when you first saw the train.

A. I was standing on the platform that runs right along this post office, standing right about there—indicating—just immediately on the crossing, and the train was passing up. I saw it pass up. There were two teams waiting when it passed up. I saw them start to move across. I did not see Mr. Holmes until he was approaching very near the crossing, and at that time the train had reversed and was running back, and the thought struck me that it would catch him before he got across. These teams had moved across; the hind team was just barely off the track as his horses approached the track. He was crossing to the west side; they were crossing this way next to the box cars at the old depot and he came in on the other side. As his horses struck the track he kind of raised his hands and slapped the lines down, and they sprang forward, and the caboose—that is, the car attached to the train—struck the hind wheel of the buggy, and it kind of reared it up and slid it around, and the horses sprang forward and it pitched Holmes right out kind of over on his head and shoulders. I was there to him as quick as anybody and helped pick him up. I thought at that time that he was killed.

McNaught: We think that is not material.

Court: No; that is not material.

89 Q. State whether or not he was sensible, whether he was conscious or unconscious at the time you went to him?

A. He was unconscious at the time; he did not hardly seem to breathe.

Q. How long did he remain unconscious?

A. Well, I could not say as to that. I know they carried him into Mr. Rickett's room, and I saw they were working, and I left there then, *and I left there then,* and when he came to consciousness I could not say how long it was.

Q. When did you first find him conscious?

A. Well, I forget whether it was the next day evening or the second day. I cannot remember whether it was the second day afterwards or the first day.

Q. Did you see that train from the time it moved over the crossing east until it reversed?

A. Yes, sir.

Q. Of what did the train consist?

A. Well, the locomotive was first this way, and then there were two flats, I think, between that and the caboose. I am pretty positive there was two flats between that and the caboose, making three cars behind the locomotive.

Q. What was there in front of the locomotive?

A. I don't think there was anything. The locomotive was running east, and it was in front of the train when it passed up, but when it reversed it was backing, the caboose was first.

Q. Is your recollection clear as to whether or not there was anything in front of the engine?

McNaught: We object.

Court: I think he has a right to ask the question. Objection overruled.

McNaught: We will save an exception.

A. Well, it seems to me that they were pushing the box car as they ran up; they were shoving a box car back. I am pretty certain that there was a box car in front of the locomotive as they ran up, but as they ran back they were cut loose from it.

90 Q. How far east did the train run, the whole train, before the engine was reversed?

A. Well, it did not run—the back end of the train did not run past.

Andrews: There are four switches there.

McNaught: We object to counsel making suggestions to the witness.

Court: I do not think it improper. The witness has a right to speak intelligently.

Q. Now, how far do you recollect that the train moved east?

A. Well, I think that the caboose car moved up the length of one car or probably two cars past the crossing before it reversed. My best recollection is that it was a car and a half or two cars.

Q. What rate of speed, if you know, was the train moving at the time of the collision?

A. Well, I stated that here once before. It was running the usual rate of speed—that is, of their switching speed, but I suppose anyway it was 12 to 15 miles per hour, because it was running down grade and went back pretty speedy.

Q. How far west after the collision occurred did the train proceed?

A. I think they went somewhere near this other crossing. I think when they backed past this crossing that the engine stopped somewhere near this other crossing. I think that is about where the train stopped on the other switch.

Q. When did you say that you first saw Mr. Holmes?

A. At the time of the accident?

Q. Yes, sir.

A. Right at the time of the accident, when I saw him pitched out of the buggy.

91 Q. Were his horses when you first saw them walking or trotting—how were they moving?

A. Well, I did not see them until they got pretty near onto the crossing, and they were coming in a walk, you might say, as I immediately saw them he slapped the lines and they sprang forward, so that the move was made forward almost as I saw them.

Q. Do you know who it was that went over the crossing north as he came south?

A. Well, I did not take any notice of them at the time who they were. I have heard since who they were, but I did not pay any attention as to who it was at the time.

Q. You say you have heard since who they were?

A. Yes, sir.

Q. Which side of the crossing did they take?

A. They took the right-hand side of the crossing in going north. They took to the right against those cars.

Q. Now, do you know whether or not, Mr. Skelton, there were any cars standing against the warehouse, on the side track there, at the time of the collision?

A. Yes, sir.

Q. How many were there?

A. My best recollection is that there were four box cars.

Q. How did they stand?

They stood immediately joined up to one another. I do not

Q. whether they were coupled together, but they were run close

you seer.

A. Yow far west did they reach?

Q. Were is a kind of a platform, an apron, running down from

defendan rm down around the warehouse, and the first car next the

A. I wak, next the crossing, I think, stood a little past this apron.

front of m. How far past do you think it stood?

A. Well, I should put it about a foot.

Q. Have you ever made an examination of that situation as to whether or not a person approaching the crossing as Holmes was on that occasion could see the train by a car standing in that position approaching as you saw this one was approaching?

A. Yes, I think I have noticed it.

Q. Now, if there is a point at which a person approaching the crossing could see the train, point to the jury where it is, and state under what circumstances.

A. In the first place, the building standing there obstructs the view of the road for considerable distance to any one coming along this street (indicating B street). These cars being there he could not see the train on the track here at all unless he would almost come past the car. He would have to almost pass the box car.

Q. Did you notice, Mr. Skelton, what kind of a rig he was driving in on that day?

A. It was a two-horse buggy.

Q. How near to the track on which the colliding train was would those horses have to be when Mr. Holmes could have seen the colliding train?

A. Well, he could not see the train up here, for instance (indicating), it was a car and a half up and he would have to be in parallel with that before he could see. He would have to be in parallel on the south of these box cars before he could see the train.

Q. Where would his horses be when he could see the train?

A. His horses would be about on the main track, crossing the main track.

93 Q. Did you see Holmes the moment his horses started up?

A. As they sprang forward, that is just about the time I noticed them.

Q. In what direction was he looking then?

A. He was looking across the road; seemed that he had his eye on his horses when I looked, as well as I remember.

Q. How high is that building which you say obstructs the view to a person approaching the crossing?

A. Well, from the ground to the eaves it must be 12 to 14 feet.

Q. Any more than that?

A. 14 feet; it is not less than that anyway.

Q. How high does the top of a box car stand from the ground?

A About 11 feet. I think 11 to 12 feet.

Q. Did you notice how many teams there were passing over that crossing to the north at that time?

A. I remember two teams, two wagons standing there.

Q. Were they two-horse or four-horse teams?

A. I think one was a four-horse and one a two-horse, if my re lection serves me right.

Q. Did you know Mr. Romick at that time?

o the

A. Yes, sir.

Q. Do you know the position that he held in the emplo

right to

the defendant?

A. He was yardmaster.

east?

Q. Did you see him on that occasion?

of one

A. I did.

Q. Where was he and what was he doing?

A. He was managing this switch (indicating switch below crossing) on the west side of the crossing, and just as Mr. Holmes was approaching the crossing he walked across, I think, to get on
94 the end of the train or to this other switch. I do not remember the position he took. Anyway he moved across the crossing.

Q. Where was he at the time of the collision?

A. I think that he had crossed the street somewhere about here. It all happened almost in an instant; he left and passed just in front of Mr. Holmes and came along up here somewhere (indicating).

Q. You saw him pass in front of Mr. Holmes?

A. Yes, sir.

Q. Which way was he facing while operating the switch?

A. He was facing to the north.

Q. Was there any obstacle intervening between him and Mr. Holmes that would have prevented him seeing Holmes?

A. No, sir; there was not. He might possibly have been looking after the train that went up. He was operating the switch and the train passed right by, and there was nothing between him and Mr. Holmes at all and he hallo*wed* to one of those teams that was going across that way, "Hurry up, or I'll take a wheel off," as he was passing this way.

Q. State whether or not you saw him make any motions towards Mr. Holmes.

A. No, sir; I did not see any motions.

Q. Did you see any employé of the defendant upon the colliding train as it moved down?

A. Not on the rear of the engine; nothing on any of the cars. I did not notice any person on the end of the train or on the train at all.

Q. Well, what is your knowledge with reference to there being a person on the end of the train next the crossing, as it was moving down?

A. I do not remember seeing any one on that car at all.

95 Q. Were you looking in that direction at that time?

A. Yes; I was. My eye was on the crossing, on Holmes, the passing of the train.

Q. Well, if any one had been on the end of the train, would you have seen him?

McNaught: We object to that question.

Court: Better ask him if he was in a position to see.

Q. Where were you standing at the time of the collision? Did you see the colliding train?

A. Yes, sir.

Q. Were you in a position to see any person, an employee of the defendant?

A. I was. I was in position to see. The train was passing in front of me.

Q. Did you see any one?

A. I do not think I did. That is my recollection, that I did not see any one on the train.

Q. Do you know whether or not the bell of the locomotive was ringing on that occasion?

A. I think not.

Q. How far were you standing away from the locomotive at the time the collision occurred?

A. Just across this street. I should judge something like sixty feet.

Q. Do you know of anything that would have prevented you hearing the ringing of the bell? Had it been ringing?

A. No, sir.

McNaught: We move to strike the answer out.

Court: Objection overruled.

McNaught: We except.

96 Q. What is your answer?

A. There was nothing to prevent it.

Q. Now, state whether or not you did hear that bell ring.

McNaught: We object.

Court: I will permit the question to be answered.

McNaught: We except to the ruling of the court.

A. I did not.

Q. What is the distance from the post office to the platform where the collision occurred?

A. It is about 70 feet. I should judge that it was 70 feet. It is kind of an angle.

Q. State, if you will, how far Holmes was thrown away from the track at the time of the collision.

A. Well, he struck the ground about 12 to 13 feet from the track.

Q. And in what direction from the place where the cars hit him?

A. The cars struck the buggy and threw him out kind of across this switch as he went by, and he lit right about there—indicating—in that direction from the crossing, on the west side.

Q. Mr. Skelton, — if you were in a position that you could observe any signals made by the defendant's employees of the approach of this train if any had been made?

A. I was.

Q. Did you observe any signal or warning of any kind given by the defendant?

A. I did not.

Q. Have you ever sighted over this track or made any estimate as to where these cars could be seen by a person approaching the crossing from the north?

A. Yes; I have looked at it.

Q. What was the result of that observation? State it.

97 A. The result was you could not see a train passing up here (indicating) until you came parallel.

Q. With the track here?

A. You could not see any train moving after it was, say, a length and a half past this box car.

Q. Look at that plat generally, Mr. Skelton, and state to the jury if you know whether or not that is a correct map of that place, as near as you remember.

A. Yes; that is pretty correct.

Q. In which way did this colliding train move at the time it moved from the east to the west; on which track did it move?

A. Well, I think that they had got to this track here (indicating), the first switch. I think they shoved a car on this track, run far enough to pass this switch; that is my recollection.

Q. What is your occupation, Mr. Skelton?

A. Usually a carpenter.

Q. Did you know Mr. Holmes before he was injured?

A. Yes, sir.

Q. What was his condition physically?

A. Well, he was a good, stout, able-bodied man; stand as much as any of us.

Q. What wages was he capable of earning at that time?

A. I think that he got the same as the rest of us got.

Q. What was that?

A. $3.50 per day.

The court, after cautioning the jury as to their conduct, adjourned until 1.30 p. m.

98 Court opened pursuant to adjournment at 1.30 p. m.

Continuation of the direct examination of Skelton:

Q. Do you know whether or not at the time of the accident the defendant had any custom with reference to the ringing of the bell of the locomotive engaged in the operation of the trains?

A. It was the custom usually to ring the bell in switching when crossing those crossings and has been right along.

Q. Did you state how many cars there were which stood on the side track near the warehouse?

A. Standing on the track—I think there were four.

Q. State to the jury how fast, if you noticed, Holmes was driving at the time he was on the planking.

A. Well, I stated before that I just saw Mr. Holmes.

Q. How is the city divided with reference to population in Sprague on either side of the railroad? State how it was divided at that time.

A. Well, I should judge that there was about one-fourth or something near that of the population north of the road.

Q. And where was the remainder?

A. On the south side.

Q. Do you know whether or not the grade along which the colliding train was moving was level or up or down grade?

A. Running west it is down grade.

Q. What is the grade? State if you know.

A. Well, I could not say. I guess at the rate of ten feet to the mile.

99 Cross-examination.

Questions by McNaught:

Q. You stated that this accident occurred about three o'clock in the afternoon?

A. I think that it was about that time or near it.

Q. Of what year?

A. 1883.

Q. What month?

A. November, I think.

Q. What distance were you standing at the time of the accident from the place where the collision occurred?

A. About sixty feet, I should judge; something like that.

Q. Were you standing on the sidewalk?

A. Yes; on the sidewalk.

Q. Was not at that time the distance from that sidewalk up to the railroad track 125 feet?

A. I think not.

Q. Your judgment is that it was not that far; that it was sixty feet?

A. It might be a little over that, but I don't think much over that. I don't think it is over 80.

Q. You say you saw the train as it was going east just prior to the collision?

A. Yes, sir.

Q. You saw it stop?

A. Yes, sir.

Q. And reverse?

A. Saw it stop.

Q. And run back?

A. I saw it run back.

100 Q. And saw the collision?

A. Yes, sir.

Q. You stated that it ran up east about a car-length and a half from the crossing, I believe?

A. Yes; I think near that; perhaps two cars.

Q. What is the length of a car?

A. 32 feet.

Q. Will you mark on the diagram with this pencil about where the train stopped?

A. The train ran this way: the back end of the train, as well as I remember, was somewhere near about that (indicating on diagram); perhaps it might have been two car-lengths above the crossing; I could not say positively.

Q. Then make a mark just where you think it was on the track which it was running.

A. It was about here (indicating).

Q. What rate of speed was the train going when it was going east before the collision?

A. Going east?

Q. Yes, sir.

A. Oh, I don't think the speed was very great in going up; just the usual switching speed running up.

Q. About what rate of speed was it running east?

A. Well, six or seven miles an hour; I should think about that rate.

Q. How many cars were there altogether on the train as it was going west?

A. I think there were three cars attached to the engine; that is my recollection, that there were three cars.

Q. Including the caboose and box car?

A. Including the caboose.

101 Q. What were the other cars?

A. I think they were flat cars and the caboose on the end of the flats.

Q. Did you not state in your examination this morning that there was a box car also?

A. In front of the engine, as they pushed up, I think they pushed a box car upon one of those tracks as they run up.

Q. And the engine, as the train was going west, was on the east end of the train?

A. Yes, sir.

Q. Do you know what rate of speed, Mr. Skelton, the train composed of an engine and three or four cars can get up in, say, sixty feet distance on a down grade of ten feet to the mile?

A. No; I could not say just what rate of speed they could get up in that distance.

Q. You are not an engineer?

A. No, sir.

Q. Never run a train?

A. No, sir.

Q. I will ask you, Mr. Skelton, if a train of three cars or more on a down grade of ten feet to the mile can start and get up in sixty feet more than six miles an hour.

A. Well, I think they could; I think perhaps they can.

Q. That is your judgment about it?

A. Yes, sir.

Q. You would not pretend to say they could?

A. Down grade they can throw all the force on; they can get up a pretty good speed.

Q. You stated in your examination this morning that you had
testified before in reference to the speed of the train at
102 the time of the collision, I believe?

A. I believe I did.

Q. Do you remember at what rate of speed you stated before the train was running at the time of the collision?

A. I stated that I believed that she must have been running about 18 miles an hour, 18 to 20 miles an hour.

Q. Did you not state before, Mr. Skelton, that the train at the time of the collision was making 25 miles an hour?

A. Well, I don't know but I did.

Q. Then, did you not also state on cross-examination that you could not say——

A. Positively, no.

Q. How fast the train was running, but that it was running pretty fast?

A. Yes; that was my statement.

Q. Did you not also, on cross-examination, say that you were not a very good judge as to the rate of the speed of a train?

A. Well, I don't know that I made that remark. My statement was about this, that I judged the rate from other trains running at a regular speed.

Q. Well, your statement this morning was that the train was running at the time of the collision at about 12 to 15 miles an hour?

A. Yes; I stated that. I am positive it was running almost that rate, that fast, if not more. I should not put it lower than that.

Q. Now state, Mr. Skelton, if you think it possible for a train of three cars running on a down grade of ten feet to the mile can get up a greater rate of speed than six miles an hour in 60 feet distance.

103 **Andrews**: We object. The witness has said that he was not a competent judge of the rate of speed.

Court: I think it is proper cross-examination to test his ability to determine.

Q. What is your answer?

A. I think they can.

Q. Well, what rate of speed?

A. I think I have noticed them gather more than that rate of speed more than once in that distance when they reverse. It is a very easy matter to throw all their weight on the leverage power.

Q. Do you know whether that train at that time was operated with or without air-brakes?

ANDREWS: We object. It is immaterial.

McNAUGHT: We think it is very material with reference to the stopping of the train, and our next question shows its materiality.

COURT: Objection overruled.

ANDREWS: We except.

A. I don't think there was any air-brakes on them.

Q. Now, do you know within what distance, Mr. Skelton, a train running 12 miles an hour with three or four cars and an engine can be stopped on a down grade of ten miles an hour?

A. No, sir; I could not say as to that how far they would; it would be owing more to the brakes they would have.

Q. What is your judgment about the distance within which such a train could be stopped on such a grade?

104 A. My judgment is that by reversing the steam of the engine they can stop within the length of itself. When they want to stop this train quick they reverse the steam and it throws a great leverage upon the stoppage of the train, stopping almost immediately.

Q. Did you make any statement on your previous examination as to the distance within which a train could be stopped running 15 to 20 miles an hour on a down grade of ten feet to the mile?

A. I think maybe I did; I am not positive.

Q. Did you not state that in your judgment it would take about three hundred feet?

ANDREWS: We object. I insist that Skelton on the last trial did not testify that the grade was only ten feet to the mile.

COURT: I think that the question can be asked.

ANDREWS: We will ask an exception.

Q. Please answer the last question.

A. Well, perhaps I did. I cannot say. I am not positive about it.

Q. What is the distance between the crossing where the collision occurred and the one to the west of it?

A. 200 feet.

Q. You state that this train colliding with Holmes' wagon ran down pretty near to that crossing?

A. Yes; I stated that the engine stopped somewhere at the other crossing; the train was past the crossing, but the engine stopped somewhere near that crossing; perhaps might have been right on that crossing, but it was very close there.

Q. On your former examination did you make any statements concerning the place that train stopped?

A. I don't think I did.

105 Q. Did you not on your former examination say that you did not observe how far the train went to the west after the collision, that you went immediately down where Holmes was?

A. I do not remember now.

Q. You do not remember now that you made that statement?

A. No; I do not.

Q. On your former examination, Mr. Skelton, did you not say that you could not tell whether there were three or four box cars on the side track next the freight depot, but that your impression was that there were four?

A. Yes; I think I made that statement.

Q. There were two teams, I believe you stated, on the south side of the crossing at the time the train went to the east, one four-horse team and one two-horse team?

A. Yes; I believe that is the fact.

Q. Do you know whose teams they were?

A. I did not think anything about it at the time, but I learned since that it was Breslaun and Fish.

ANDREWS: I shall object on the ground that it was mere heresay.

COURT: Do you wish it stricken out?

ANDREWS: Yes, sir.

COURT: I will strike it out.

Q. Which was the four-house team, the one in front or the one in the rear?

A. My recollection is that the four-horse team went across first?

Q. Were they going over at the same time Holmes was passing over?

A. Yes, sir.

Q. Holmes was to the west of the two teams?

106 A. Holmes was to the west of the two teams.

Q. You stated, I believe, that immediately after the two-horse team had passed north of the switch at the crossing that Romick went around behind the team, and, as he passed, going to the east side, said, Look out! or something of that kind; "I will take a wheel off."

A. He hallowed out, "Hurry up, or I will take a wheel off." I won't be positive whether it was a two-horse team or a four-horse team. My recollection is that the four-horse team went first.

Q. Then Romick went east?

A. Yes, just as soon as the team passed—well, he kind of bore off around past the back end of the wagon, the hind wheels had not come on the west track when he passed around the back end of the wagon.

Q. Romick was standing at this lower switch?

A. Yes, sir.

Q. How far is that switch from the track?

A. About four feet, I think, maybe, from the outside rail.

Q. How far apart are those two tracks, the main track and this point—the main track and the side track?

A. The best of my recollection is that it is about the same space between the two tracks. It may be a little wider, perhaps.

Q. Then Mr. Romick walked up?

A. Up here some place. He perhaps got off about here (indicating). I do not think that he got any farther than that at the time of the collision.

Q. You stated that a box car was about 11 feet high, I believe, Mr. Skelton.

A. Yes, I stated that I thought that that was about the height from the ground up to the top.

107 Q. How much higher is the smoke-stack of a locomotive than the top of a box car?

A. Well, it is about three feet.

Q. Is it not about four feet?

A. Well, perhaps it is. It is close to that; it is about that height.

Q. How much higher is the pilot of a caboose car than the top of a box car?

A. Well, let's see; it is about to the top of a box car. The pilot may be 2½ feet higher than the top of a box car.

Q. How much higher was the ground at the time of the accident in front of White's saloon than the railroad track at the place where the collision occurred?

A. I think that it is just about three feet.

Q. Suppose, Mr. Skelton, that a man was sitting in a buggy in front of White's saloon, facing towards the place where the collision occurred, and a box car was situated about where these are (indicating plaintiff's diagram), and a caboose along here, and a locomotive along here; can you see the top of the caboose and smoke-stack of the locomotive over the top of a box car?

Andrews: We object. It is not a cross-examination and is irrelevant and immaterial. There is no testimony tending to show that that was the relative position of the colliding train and the cars.

McNaught: Counsel stated in his opening remarks that the plaintiff could not see from any point as he approached, and I thought it was legitimate—and I think so yet—to cross-examin*ation* this witness on these various points as to how much and what points Mr. Holmes could see as he approached this crossing.

108 Court: I think Mr. Andrews fixed Mr. Holmes as driving from a point down to this crossing and showed by this witness that cars could not be seen until he got on the crossing. I think that it is proper cross-examination as to whether he could have seen at some other point along that line.

Andrews: I think we wiol waive our objection.

A. Well, I have noticed from White's saloon you might see the top of a caboose or cupola of a caboose diagonally across the top of this box-car, perhaps about half way, but after leaving White's and getting along in here somewhere, then it throws you behind the old building.

Q. Does not that depend on which way you come down from

White's, whether you come down on the north side of the street or near the center of the street or the south side of the street?

A. Well, usually a wagon would drive, when they turned around, sort of down this way and then turn and drive along a good deal as this diagram shows you, come off a little raise and it lets you down in a sort of a low place, the lowest that there is in the street.

Q. Now, Mr. Skelton, this is Mr. White's saloon here (indicating)?

A. Yes, sir.

Q. Now, laying a straight-edge from White's saloon past the corner of that building—this is the corner of the building?

A. Yes, sir.

Q. And this is the platform around here—laying a straight-edge from that point, can you not see, at any point where you can se- past the end of the depot from White's saloon, *see* the caboose car and the top of the smoke-stack on any of the side tracks south of the main track parallel with that straight-edge?

A. Yes; if up there at White's saloon. In front of White's saloon it is kind of elevated piece of ground.

109 Q. Then, when Mr. Holmes was in front of White's saloon he could see that train where it stopped?

A. I judge he could if it had been there.

Q. What do you say the distance is from White's saloon to the crossing?

A. It is 200 feet on a line to here; of course, diagonally, that would be just that much farther.

Q. It is not quite 200 feet to the crossing on a line?

A. When he has not got to the crossing it would be fully two hundred feet to the crossing.

Q. At what rate of speed do you say that Mr. Holmes was traveling when he was coming down from White's saloon towards where the collision occurred?

A. I did not say that I saw him coming down from White's saloon; I did not see Mr. Holmes or notice him until just as his horses were coming on the track.

Q. Now, which one of these side tracks did you say that this train was standing on when it went east, stopped, and reversed?

A. (Indicating first track and switch south of main track.)

Q. How much higher is a man sitting in a buggy of ordinary height than a man standing on the ground?

ANDREWS: We object. That is a matter of general information about which the jury is as well informed as the witness, besides, no question has been asked the witness to show that he has any special knowledge of that matter.

The COURT: If he h-s any special knowledge he can say so.

Q. Have you ever observed a man sitting in an ordinary high buggy as to how much higher he would be than a man standing on the ground?

A. Oh, he would be, I should judge, something like his sight would be, something like a foot or so higher.

110 Q. Would he not be about two and a half to three feet higher in an ordinarily high buggy?

A. I think not. I don't think that he would be over 18 inches.

Q. What was the difference in the elevation of the ground at this point just at the edge of the planking just at that time and the place where these cars were standing on the side track?

A. I think that there is near 18 inches; something like that.

Q. Is not the planking from north to south about level?

A. It is a little incline—pitches from the track out. It inclines downward.

Q. About how much?

A. Very near a foot.

Q. Was the planking west of the depot there at the time the collision occurred?

A. I am not positive of that. It strikes me that it was only laid to about here—about two-thirds of the way across there. At that time they were putting in this new track. I don't remember whether they had that track down. I do not think that it was finished to there, anyway.

Q. Now, is not that track on a level with this track?

A. I do not think it is.

Q. Not quite as high. Do you remember the difference, if any?

A. Well, there is very little difference, but there is a little raise here made over the track.

Q. Now, Mr. Skelton, cannot a man standing in a buggy of an ordinary height there on that point on that track see the top of the smoke-stack or of a caboose car over the box car standing right there?

ANDREWS: Counsel says standing.

111 Q. Sitting in a buggy or ordinary height?

A. Well, he could not see very far up from that point there.

Q. Well, about how far up could he see?

A. One length of a car.

Q. And the distance that it would throw you from there over to here?

A. One length of a car.

Q. Now, a car, you say, is 33 feet long?

A. 32 feet, I think.

Q. And the distance between the two tracks there you think is about four and a half to five feet?

A. Yes; I think it is about four and a half to five feet.

Q. Then you mean to be understood as saying that he could see from that position across this right angle, whatever it amounts to. Now, then, when you get him to this track what does it amount to?

A. You would be something near forty feet, but then a person sitting here behind this car I do not think it possible to see anything over, being close to it, the car set up like that.

Q. Did you ever try it in a wagon?

A. No; I never particularly tried it. My judgment is when you come to that point you could not see anything over these cars.

Q. When you first saw Mr. Holmes, then, his horses were just coming on to the track?

A. Right about the track; yes, sir.

Q. And the rear of the wagons going to the north were then just passing over the track?

A. Yes, sir.

Q. How were those wagons moving as to speed; were they walking or trotting?

A. Pretty stiff walk. They were not trotting, I do not think.

Q. How was Mr. Holmes' team moving?

112 A. Well, about how it had been moving I could not say. It seemed just as I cast my eye on them they were just at a brisk walk, but just at that time I noticed that he fetched them a slap with the lines.

Q. And then they started and went a bit faster?

A. They sprang right up.

Q. What was the condition of the ground west of the crossing and north of the track at that time?

A. Well, it has been filled in here; there was a kind of drop up here.

Q. Do you remember how much?

A. Immediately close to the track there was something like about a foot.

Q. Then when you got off of that drop of about a foot the ground was comparatively level?

A. Yes; that has been filled in since.

Q. Now, Mr. Skelton, did you state on your examination before as to what grade there was at this place where the collision occurred?

A. I believe I did.

Q. Did you not say that it was forty feet instead of ten feet, as you testified this time?

A. I do not remember now whether it was forty; maybe it was; I was approximating.

Q. You stated that this train was a switch-train?

A. Yes, sir.

Q. Is that place where the collision occurred the usual place for switching and making up trains at Sprague?

A. Yes, sir; in switching and making up trains they are crossing backwards and forwards.

113 Q. How often during the day do trains pass backwards and forwards over that place?

A. I could not tell.

Q. Pretty often?

ANDREWS: I do not think that is a cross-examination. I did not examine him as to whether or not they were moving that train once or a hundred times a day, or anything of that kind.

The COURT: I think that this examination will facilitate the trial.

It is in the discretion of the court to confine counsel strictly or to permit them to go into a more full cross-examination. I think that it will facilitate the trial to draw out such facts as they may. The witness, however, is Mr. McNaught's witness as to all such matters.

Q. You cannot tell the number of times that trains pass?
A. They would pass more frequently through other parts of the day than at some.
Q. Was there any regular time for making up trains and switching?
A. No, sir.

ANDREWS: This is Mr. McNaught's witness.
The COURT: I was not very technical with you on your questions and I do not think I will be with Mr. McNaught.

Q. You stated that you worked with Mr. Holmes at the car shops?
A. Yes, sir.
Q. Where were the car shops located?
A. Right along there somewhere (indicating on diagram).
Q. How long did you work with Mr. Holmes in that shop?
A. Four or five months.
Q. When was that?
A. That was in the fall of 1882.
Q. This crossing was used here at that time?
A. Yes, sir.
114 Q. Now, you people were all familiar with the surroundings and locations there at that time, Mr. Holmes, as well as the balance of you?
A. Necessarily so.

Redirect examination.

Questions by ANDREWS:

Q. Did you ever ride across that crossing in the same situation that it was in at the time that the collision occurred—that is, in a buggy of ordinary size and height?
A. I have; yes, sir.
Q. Did you ever, when riding across in a buggy in that condition, sitting uprightly in it, have occasion to make any observations as to whether you could see the pilot-house of a caboose over the top of a box car?
A. I do not think he could very far., Whether I made direct observations, I do not know that I did, particularly.
Q. You never made any observations?
A. I do not think that I made direct observations.
Q. Then, as a matter of fact, do you know whether or not a person sitting in an ordinary-size buggy, under any such circumstances as the accident occurred, — have seen the top of a caboose over the top of the box cars?

A. I think not. I do not think that he could have seen it further than the length of one car.

Q. The question I asked you is whether he could have seen the top of a caboose over the top of a box car.

A. I don't hardly believe that he could.

Q. Do you know at what rate of speed a team of horses walking, when they are walking at a brisk walk, what their rate is?

A. Oh, something near the rate of four miles an hour.

115 Q. How wide is the planking from the east to the west on which this collision occurred—how wide was it at that time?

A. I think it was about twenty feet, maybe.

Cross-examination.

Questions by McNaught:

Q. Is it not about twenty-five feet?

A. I do not think it was at that time.

Q. Think it was about twenty feet?

A. I do not think it was more than twenty feet.

Q. Is there any change in the planking, so far as east and west is concerned—has there been any change since that time?

A. It strikes me that there has been. In this washout where this track is has been lengthened out.

Q. Has there been any change here (indicating)?

A. I do not know that there has on the track.

Q. It is the same now that it was then?

A. I think so.

116 James Holmes, plaintiff, sworn, testified in his own behalf as follows:

Questions by Mr. Andrews:

Q. Are you the plaintiff in this case?

A. I am.

Q. What is your age at the present time?

A. I was 56 the 12th of last May.

Q. Your name is what?

A. James Holmes.

Q. Were you in Sprague on or about the first of November last?

A. Two years ago?

Q. November 1st, 1883.

A. Yes, sir.

Q. Did you have an accident on that occasion?

A. Yes, sir.

Q. Relate to the jury how the accident occurred.

A. In the morning of the first day of November, 1883, I got a buggy and two horses of Mr. Nelson's stable and asked Mr. White to go with me about 14 miles and see a piece of land I had there. I told him to take his gun along, might be some ducks, and we walked over a quarter of a section; walked over a quarter of a

section pretty thoroughly. While out there he shot a duck and when we came back drove around. White is a saloon-keeper. He got out at his saloon. I handed him the gun and duck and stock of wheat he had. I drove on down the street. When I got most to the railroad I saw some cars and a locomotive attached going up. When I say going up I mean going east, up grade, and they went up out of my sight and then I was near the railroad at the time they went out of my sight, and there was two teams waiting on the other side of the railroad. They had not started, but they did start. I met the first team before it left the planking and I
was on the main track. My horses were on the main track
117 and before the hind wheels of the last team had left the main
track and about that time I saw a car moving towards me, coming fast. I did not think of my own danger at all at that time, but I slapped the horses with the lines; had the lines in both hands; the whip stood in the socket. I slapped the horses that way (indicating) and they sprang quick and that is the last I know, except that I heard a cracking, until the doctor was working with my head.

Q. Mr. Holmes, take this stick and point out where you were when you first saw this train going from the west towards the east.

A. I was right along here somewhere (indicating on diagram).

Q. Where were you when that train passed out of your sight going east?

A. I was near that track; that track was not in there then.

Q. Did you loose sight of the train going east?

A. I have stated that.

Q. Did you loose sight of the train going east?

A. I did.

Q. Where did it pass out of your sight?

A. It passed out of my sight on account of some box cars that stood on the side track in front of this freight depot.

Q. Do you see any representation of the box cars there (indicating diagram)?

A. There is the box cars.

Q. Do you recollect how far, if any, those box cars impinged on the crossing?

A. I remember that it impinged a good deal on account of passing the team right there, and it caused me to pass around there pretty well. I think, perhaps, it was three feet below this apron; perhaps four feet. Here is an apron from this depot that is an incline, and I think the cars projected three or four feet on the planking.

Q. Well, now state where that train was when it passed
118 out of your sight and what caused it to pass out of your
sight.

A. It was a box car that caused it to pass out of my sight. I would have seen the train if it had not been for the box cars.

Q. State whether you looked over the top of the box cars.

McNaught: That is leading.
Court: Objection overruled.
McNaught: We except.

Q. State whether you looked over the top of the box cars.

A. I cannot state that I did look over the top of the box car there to see. I cannot state that I did, but the train was up out of my sight. I cannot state that I looked over the tops to see if I could see any portion of the box cars.

Q. Now, Mr. Holmes, state to the jury when it was that you first saw the car approaching you. Where were you?

A. My horses were on this main track here, and I was sitting in the buggy seat, so you can judge. There is a side track, a house, and a main track, and I had to get across between the two tracks before I could see the train up here—that is, sitting south of the line of box cars there, so I must have been between the two tracks and the house and the main track before I saw the approaching train.

Q. How long after you could have seen the car was it that you did see it?

McNaught: We object to that question.
Court: Objection overruled.
McNaught; We will save an exception.
Court: Exception allowed.

A. Well, I think I saw it as soon as it was possible to see it. I saw the moving train towards me as soon as it was possible.

Q. State what you saw on that crossing at the time you ventured upon it to induce you to venture upon it.

A. Whenever I cross a railroad I look around, I do not care when it is. When the train went up out of my sight I thought 119 I was safe, as the yardmaster stood at that switch. There were two teams on that side, they could see where the train went to; I could not. I trotted along—my horses trotted along until they came down—there is the incline (indicating on diagram). The planking projects even with the incline here—it don't go out like that shows. I trotted until I approached that planking, and there I met the other team, the forward team, and I checked from the trot to a walk and listened if there was a bell or anything of that kind, or if there was a moving train, the other two teams coming, the yardmaster standing there, so I thought I was perfectly safe in going. I should do the same again.

Q. You say that you listened for a bell, Mr. Holmes?

A. Yes, sir.

Q. What was the result of your listening?

A. I heard nothing of any bell.

Q. State whether you heard anything else that would indicate the approach of a train.

A. Nothing to indicate the approach of a train.

Q. Was there anything else about that crossing that you observed, Mr. Holmes?

A. The box cars and the yardmaster standing at the switch.

Q. Which way was *was* the yardmaster facing?

A. He was looking towards me and he was looking up the track. He saw me and he has told me——

McNaught: We object to that and move to strike it out.

Andrews: We submit what he told him——

Court: What the yardmaster told him must go out.

Q. Mr. Holmes, did you observe any one else there?

A. No, I cannot recollect that I did.

Q. I will call your attention to Mr. Nelson.

A. No, sir.

120 Q. Mr. Nelson, Peterson—did you see any of those people?

A. No, sir.

Q. Did you notice Mr. Skelton?

A. No; I did not. I was watching if there might be an approaching train.

Q. Mr. Holmes, state what your physical condition was immediately prior to your receiving this injury.

A. I was well and stout.

Q. How well were you?

A. I had good health.

Q. With reference to your being able-bodied?

A. I was; yes.

Q. What wages were you capable of earning?

A. This took place on the first day of November. I quit the railroad company the 14th day of October. I think that was the last day's work I done for them. Either the 13th or 14th, and I had been getting that season after coming out from the wash-out, I got three and a half in the wash-out and I got three and a quarter in the shop.

Q. What were you capable of earning immediately before the time of receiving your injury?

A. I was just as well as you ever was.

Q. Can you answer that in dollars and cents?

A. I could have had work right along at three and a quarter a day.

Q. Have you ever employed any medical assistance for the purpose of being cured from the injuries that you received?

A. Well, I do not know who employed Dr. Olds first. He was attending on me when I knew anything.

Q. Dr. Olds treated you then?

A. Yes, sir.

Q. Who is Dr. Olds?

A. He is a physician and surgeon. Has been residing in Sprague. He is in San Francisco now doctoring for his eyes. I believe that since I was injured he has been appointed assistant surgeon

121 for the N. P. railroad.

Q. How long did he doctor you, Mr. Holmes?

A. He treated me until the 4th of April following.

Q. That would be 1884?

A. Yes, sir; and he advised me to go to California to be treated there. My family are in California, and so I was anxious to go down.

Q. State whether you obtained treatment there.

A. I obtained treatment there, but I grew worse all the time. About the middle of April, I think it was, I left Sprague the 4th of April, and about the middle of April I called on Dr. Martin and Dr. Wilson. Dr. Martin doctored me all that summer until the third of October.

Q. Last summer or the summer before that?

A. That summer, the summer of 1884. Dr. Wilson was called in as a consulting physician.

Q. Did you receive any advice from these physicians as to the probability of your recovery?

A. They were very reluctant.

Q. I am asking you if you received any advice from them, not what it is, but whether or not you received any?

A. They advised me to keep still, and they gave medicines and used the electric battery a good deal.

Q. I will ask you if they were physicians of good repute in the community where they lived—that is, as physicians?

A. Yes; they stood high.

Q. How long after the injury occurred was it that you became conscious?

A. I do not know.

Q. After receiving the injury and becoming conscious, what was your physical condition as to being strong or weak?

A. It was perhaps eight or nine days before I could turn over or
sit up or raise myself. I could not help myself at all, and
122 then I got so I could turn over and raise up a little. I think
it was the 12th day, the man who nursed me helped me outside along in the afternoon when it was warm. After that, every day it was fair I would move around outside.

Q. What part of your body was injured, Mr. Holmes?

A. My head bothered me a great deal, but the principal part was in here in my shoulder and in my back, especially in the small of my back. It is about in here (indicating).

Q. How long after the injury occurred was it that these pains began to manifest themselves in the small of your back, the loins?

A. Well, when I first came to I know I was that way, I could not move, could not turn over, could not raise myself in bed.

Q. With reference to your head do you recollect whether or not there was any wound there?

A. There was. The doctor was sewing up my scalp when I came to.

Q. Tell the jury what kind of a wound that was.

A. The doctor—I never have seen it.

Q. You can tell from your own sensations and what was said at the time?

A. He said that the scalp was thrown right back and he had to scrape it to get the dirt, wood, and gravel, and he was in hopes to make it grow so that it would not take so long to heal up and save the hair, and he succeeded with it, although it was the last of February before he got through treating me every day, doctoring my head. At first he came to see me four times a day. Doctor- Martin and Wilson said my skull was affected.

McNaught: I believe that I will move to strike out what they said.

Court: I think that ought to be stricken out. Let it be stricken out.

Q. Mr. Holmes, from that time on what had been your ability to perform manual labor?

123 A. I have not been able to do anything.

Q. How are you with reference to urinary discharges?

A. Right away after I got hurt I discovered that I could not retain my urine nights, and when I drop asleep, as soon as I drop asleep, it would pass off voluntarily and wake me up nights. It is the same now. I have to get up four or five times a night. Through the day I can control it, but at night as soon as fast asleep I have no control of it at all.

Q. It seems to require then an effort of the will to control it?

A. It does; yes, sir.

Q. How about these pains in your back?

A. The pains in my back are bad. I don't rest. I can't rest any length of time either way in bed. Pains in my back are bad. Seems to be right inside of me there (indicating).

Q. I call your attention to your arms, Mr. Holmes.

A. Well, this shoulder, I cannot get my coat off or on to save me, and that is as high as I can get it, instead of swinging as this other. It don't bother me much now as to pain. This elbow hurts me a great deal of the time. I can swing my arm so, but it hurts me in here to swing it; my elbow gets stiff; my hand gets to sleep and pricks.

Q. How long have you felt that pricking sensation in your hand and arms?

A. Well, it has been in February, the first I noticed it after the hurting in November, the first I noticed it particularly.

Q. The following February?

A. Yes, sir; and now nights my foot cramps and gets to sleep.

Q. Which one of your feet, Mr. Holmes?

A. My left more than my right; the left one principally.

Q. I would like to ask you about your head; tell the jury how it feels?

124 A. There is times, scarcely a day, my head seems to whirl around on a top; the very top is where it bothers, and if I get to thinking and trying to place my mind on anything it seems to almost set me crazy, and right in the back of my neck and right through here it bothers me badly.

Q. Inform the jury how that is with reference to continuance, whether it is frequent or infrequent?

A. It is very frequent.

Q. Well, say how frequent it is?

A. Well, I don't know; it is a great deal of the time, a great portion of the day; especially if I get to thinking, placing my mind upon anything, it bothers me very much. If I sit without saying anything, the less I say or move around; in moving around I have to be as careful as I can; in the night-time my back and head.

Q. What do you say about your thinking, any mental effort?

A. Well, I cannot do it one day. I cannot get my mind to anything; as soon as I get to thinking of anything, I cannot concentrate my mind as I used to.

Q. How about sleeping?

A. About sleeping?

Q. Yes, sir.

A. I do not sleep well.

Q. What is the reason; tell the jury the reason?

A. Well, my feet and legs cramp, and then my urine bothers me so; waking me up as soon as I do get to sleep; one or the other.

Q. State if you ever had any of these sensations before receiving the injury.

A. No, sir; I scarcely knew what a sick day was. I had the pneumonia once, but that was all the sickness.

Q. State to the jury how you are with reference to being able to put on your clothing and take it off.

A. I can get my clothing on except my coat. I cannot get my
coat on or off, but it bothers me about dressing. I do not
125 have the use of myself, but I can get my clothes on except
my coat. I cannot get my coat on or off without assistance.
My other clothes I can get on.

Q. I will call your attention to your hip, Mr. Holmes.

A. Just in here (indicating right hip) is where it hurts me worst of all. Right over this hip.

Q. You say that is where you experience the most acute pain in your body. How was that six months ago?

A. Well, it was about the same as it is now. If anything it was not so bad as it is now. I know I am growing worse, not fast, but gradual I am failing; I know that.

Q. How about your walking, Mr. Holmes?

A. It bothers me about walking. I feel stiff in the hips, and my feet seems as though I did not know whether I am standing on them or not.

Q. How fast can you walk?

A. I cannot walk very fast.

Q. I will ask you if you can walk as fast now as you could before you were injured?

A. I used to be a good, active walker.

Q. Well, make a comparison between that condition and your present one?

A. I do not suppose that I could walk one-eighth part, no nor one-tenth part in a day as I could walk before. I cannot walk more than a quarter so fast now.

Q. What is your experience with reference to weariness?

A. Well, I am tired in moving around; tires me out.

Q. How far can you walk without getting tired?

A. From here to the hotel is as much as I want to walk now.

Q. Which hotel?

A. The Oakes house. I might perhaps walk further than that, but I am tired in getting from here there or there here.

Q. Mr. Holmes, have you been to any expense in getting the medical assistance you have testified to?

A. Yes; I have been to a good deal.

Q. Well, how much, if anything, have you? You say that Dr. Olds treated you. How much have you paid him for that treatment?

A. Dr. Olds' bill was $125.

Q. What was Dr. Martin's bill?

126 A. In California was one hundred dollars.

Q. What was the other doctor's name?

A. Dr. Wilson.

Q. Well?

A. His was $50; Dr. Burton, in Sprague, $65; Dr. Pomeroy I paid $2.50 for an examination; Dr. Johnson I paid a dollar for medicine. I never paid Dr. Johnson anything for examining me. In California I paid some $18 or $20 for medicine to the drug store; in Sprague, $9 or $10. It is not less than nine, and I think that it will exceed ten.

Q. Have you paid any one else in Sprague anything for medicine with reference to this treatment or for this treatment?

A. Except Charley Judd?

Q. Yes.

A. No, sir. Dr. Olds has furnished a good deal of medicine for me.

Q. That was included in the bill that you have already testified to?

A. His medicine bill, yes.

Q. With reference to the examination that Dr. Johnson gave you, state whether or not you are under obligations to pay that.

A. Yes, sir; I expect Dr. Johnson is to be paid.

Q. How much is it?

A. He examined me three or four time. I do not know which it is.

Q. You never made any contract with him as to what his fees should be?

A. No, sir. He gave me some medicine one time to relieve my pains. I paid him a dollar for it.

Q. Have you had any one to nurse you during the time of your injury?

A. When I was first hurt there was a young man, used to be telegraph operator for the Western Union at Sprague, nursed me 12 days, I think it was.

Q. What did you pay him for that?

A. $48. He was there night and day; took good care of me. I used to be acquainted in California.

Q. You cannot earn a liv-lihood at the present time, either wholly or partially?

A. No, sir.

127 Q. How much time then, Mr. Holmes, from the time that you received the injury up to the present time, have you lost?

A. Well, it was two years last Sunday since I was injured. Last Sunday was the first of November. The time has all been blank since then.

Q. Do you know what the custom of the defendant was at and before the time you received the injury with reference to ringing the bell on the locomotive?

A. I have always considered it customary to ring the bell.

Q. The question is whether you know whether or not the defendant had a custom of that kind at that time.

A. It was customary for bells to ring on all crossings or whenever they started the train, whether they were going to cross or not; whenever the train stopped before they started again it has always been customary to ring the bell.

Q. I will ask you whether or not at this time you received the injury and just before you saw any one at the end of the approaching train nearest you in the employ of the defendant.

A. When the train went up there was no one on the lower end in sight, and when the train was approaching me I did not see any one on the end of the train. I do not think that there was.

Q. Do you know who it was that passed you at the time you were passing from the north to the south?

A. At that time I did not know.

Q. You only know by hearsay since then?

A. That is all I know about it.

Q. State to the jury where you were when you met the first team on the crossing, the team that passed from the south towards the north. Just point it out on the plat there.

A. Where I met the first team?

Q. Yes, sir.

A. Here is what I call the apron from the freight depot down to this planking; that only came up along here on this line. My horses were on this planking; this planking extends some 25 or 30 feet. There is no planking on the south side of the crossing
as this represents. My horses were on this planking
128 as the first wagon left the planking. The hind wagon was
right up to it.

Q. Your buggy was just getting on the planking?

A. As the others went off.

Q. Can you say why it was that you pulled the horses to the right at the time you saw the car approaching?

A. I saw the train coming. I do not think it was more than six feet from me when I saw it, but it looked terribly close. My thought was of the horses; never thought of my ownself at all. The horses were on the main track, and it would have been impossible to save myself and horses at the time unless by going ahead, and I pulled them off, thinking by going to the right a little, shearing off from the car. It was not much; even if you had varied much you would have run off into the switch.

Q. I would like to ask you if at the time you saw Romick at this switch and as you were approaching this crossing whether or not Romick made any motions to you.

A. I did not see him make any; no, sir.

Q. State whether or not you saw any motions of any kind or notice of any kind from any one as to the approach of that train.

A. No, sir; I had no idea, no motion, or notice of it.

Q. State to the jury what kind of a team you had, with reference to their being spirited or slow and sluggish.

A. The team was gentle. It would go fast or slow, just as you wanted it to drive. It was a good team. I had drove it several times; it was the team I preferred.

Q. Do you think of any other statement that you would like to make to the jury? I would like to ask you, Mr. Holmes, as to this crossing here. Do you know how it was with reference to being the principal crossing or whether there were any other crossings there at that time?

A. At that time the new passenger depot was not in Sprague. They were just preparing for that. They were grading and dug into the hill on the first street west.

129 Q. Point out to the jury where the first street is.

A. That is it (indicating on diagram). They were grading back into the hill to throw this track in. They were throwing it around so as to run back of the new depot. Here is a tolerably high bank. That street was not used at that time, so when I came in from this way, by Mr. White's, and stopped for him to get out I came back here. I could not go that way. This other was the only way at that time.

Cross-examination.

Questions by McNaught:

Q. How long had you resided in Sprague before this accident occurred?

A. I first landed in Sprague on the 4th day of April, 1882. I went to work in the shop the last of June and worked there until the first part of March; was in Sprague all the time; went down to the washout and came up the first of May, and was in Sprague from that time on—a year and a half.

Q. What shop did you work in?

A. Car shop.

Q. Point out the location of the car shop on that map.

A. Well, it was up in this way about a block—that is, up straight it would be about a block and a half in here. There is three tracks coming right along here somewhere (indicating on diagram).

Q. Where did you live at that time?

A. At that time I boarded at the National hotel.

Q. In going to and from your work, then, you frequently passed over this crossing?

A. Yes; frequently; but would sometimes cross over here, and sometimes cross over here (indicating), and sometimes would go down to here, and then we would cross at that crossing.

Q. You were well acquainted with the town—the shops, railroad tracks there at that time?

130 A. Yes; I was.

Q. Where had you been, you say, that day, prior to this accident?

A. About fourteen miles. I will tell you the section.

Q. That is not necessary.

A. Section 23, 39.

Q. Who went with you?

A. Mr. White. I rode 28 miles that day and walked over a section of—quarter section of land.

Q. What did you take with you that day?

A. Mr. White took a shotgun with him and I took a pocket flask of whisky.

Q. How many drinks did you take out of it that day prior to the time of this accident?

A. I might have taken four or five; might just take a swallow.

Q. Did you not state on your examination before that you took six drinks that day?

A. I may have taken five or six. I think I stated that—five or six drinks.

Q. Now, when you came back to town which way did you come in?

A. I came in on this street, turned round here and here (indicating) and turned up here to this crossing.

Q. You stopped in front of White's saloon as you returned?

A. Yes, sir.

Q. For what purpose?

A. To let him out.

Q. What did you do after that?

A. I could not cross that street——

Q. I ask you what you did do.

A. I drove along here (indicating).

Q. How fast did you drive along there?

A. In a trot.

Q. In a brisk trot or a slow trot?

A. Fair trot; not a brisk trot; it was a kind of a lazy trot.

Q. Well, did you keep up that lazy trot until you came to the railroad track?

131 A. No, sir.

Q. What portion of the way did you keep up that lazy trot?

A. I kept up that lazy trot until my horses got on the planking—until they were going to step on the planking.

Q. As it was then or is now?

A. The planking as it is now and was then.

Q. Now, point out on the diagram just where your horses stopped trotting.

A. It would be on a line.

Q. Then you kept trotting until you got within how many feet of the railroad track—of the main track?

A. It might be 25—not over 30—somewhere about 25 feet.

Q. Then did you stop at that point?

A. They stopped trotting and walked until I saw the train, and then they sprang or started quick.

Q. Now, where were you when you saw the train going east first?

A. I might have seen the train before. I was along there—driving along there—when the train went out of my sight. The train came this way. We were going parallel with each other.

Q. Did you not state on your examination before that you did see the train as you turned around by White's? Did you see it there?

A. I don't believe it — there; I don't believe I noticed it there.

Q. Now, when did you first see the train?

A. Along here (indicating).

Q. Point out on the map where you were.

A. About there (indicating).

Q. About how many feet from the crossing?

A. Might have been sixty.

Q. Where was the train at that time?

A. The train was opposite me, here, going up, and as I came along here the train was going faster than I was and went out of my sight before I got to the planking.

132 Q. How many cars were in that train at that time, and what were they?

A. There was two or three box cars and some flat cars, then a locomotive, and I believe a caboose behind.

Q. Where was the locomotive as to being at either end of the train?

A. It was towards the hind end of the train; most of the cars were in front of the locomotive.

Q. How many of them?

A. I think it was two box cars and two flat cars. I would not say what it was positively. That is the kind to the best of my memory.

Q. How many cars were behind the locomotive?

A. I think there was nothing behind the locomotive but the caboose.

Q. Then the locomotive was not on the east end of the train?

A. No, sir; it had cars each side of it.

Q. Which end of the train was the locomotive on as it came back and collided with your team?

A. I could not say as to that.

Q. Did you see the locomotive at all as it came back?

A. No, sir; I saw the car coming. I could not tell you how they were.

Q. What space of time intervened between your first seeing the train and the time of the collision?

A. I cannot say. I would not swear that I did not see the train when we were driving along parallel. I showed you about where it went out of my sight.

Q. The train went out of your sight when you were sixty feet from where the collision occurred?

A. Yes, sir.

133 Q. You drove along in a trot until you got to the planking?

A. Yes, sir.

Q. Then walked over?

A. Yes, sir.

Q. How long did it take you to drive that sixty feet?

A. I would not suppose that it would take over a minute and a half or two minutes to drive sixty feet. I would not think it would.

Q. And your horses trotting all the time until you got to the planking?

A. It might not take me a minute; I could not tell; I did not time it; I never did time it.

Q. Now, sir, can't you walk sixty feet in fifteen seconds, as old and crippled as you are?

A. Well; no, sir; I cannot do it.

Q. How fast was your team going as you came down from White's?

A. I might have been going five miles an hour or six miles an hour.

Q. You kept up that gait. That would be your average all the way down. Now you say you halted—checked up into a walk?

A. Yes, sir.

Q. What did you do that for?

A. Because I was coming to the planking, and there was a little raise that I thought would jar the buggy where it would strike under the raise in the planking. That is why I done so, and then the other teams were on the crossing there and I did not think—well, I would not at any time—I would not think it was safe to drive across a crossing on a trot.

Q. You checked up to give the teams a chance to get away?

A. No; it was not necessary on account of the other teams.

Q. They were crossing on a walk, or how?

A. On a walk.

134 Q. Were they all on the planking at the same time?

A. All of our horses were at the same time.

Q. The four-horse team and the two-horse team following and your own horses?

A. I could not say that it was a four-horse team. I could not say that there was a four-horse team. I know that there were two teams.

Q. Do you or do you not remember whether there was a four-horse team or not?

A. No, sir; I would not say that there was a four-horse team there.

Q. Did you have any conversation with these people as they passed over?

A. No, sir.

Q. Did any of them speak to you?

A. No, sir; not to my knowledge.

Q. You say, then, that you checked your team just as you were getting to the planking, because you thought it was not safe to trot over the crossing?

A. Yes, sir. I also listened; thought there might be a train coming down. I listened.

Q. You supposed that there might be a train coming down. Why did you suppose that there might be a train coming down?

A. A man is never safe unless he looks out on railroad crossings.

Q. And what kind of a train was this did you saw going up?

A. I have explained that to you.

Q. Well, was it a switch-train?

A. I could not say whether it was a switch-train. It might have been or not. It did not look to me like a regular train.

Q. Did you not, on your examination before, say that it was a switch-train?

A. I might have stated that it was a switch-train.

Q. Don't you think it was?

A. I would suppose it was, but I would not swear to it. Did I swear it was a switch-train before? I supposed it was a switch-train before.

135 Q. You suppose so now?

A. Yes, sir.

Q. What time of day was that?

A. About four o'clock.

Q. In the afternoon?

A. Yes, sir. Why I think it was about four, I know White and I stopped out about four miles and picked up a stock of wheat, and I spoke about putting it in the buggy if it was there when we came back, and we spoke about it and thought we would get into town about four o'clock. I remember that.

Q. Did those teams that were passing over the planking and crossing and two tracks there make any noise?

A. Well, any teams will make a noise on planking, but they were not making so much noise that I would not hear the bell ring.

McNaught: We object.

Andrews: You have a right to explain.

Court: I think the witness has a right to make an explanation.

McNaught: We will except.

Q. You said, Mr. Holmes, that you drove down on a trot until you got up to the planking and that planking was 20 to 25 feet of where the collision occurred, and then you walked your horses from there until you saw the train, and then you slapped them with the lines?

A. Yes, sir.

Q. And that was all you did, was it?

A. Yes, sir.

Q. Mr. Holmes, describe the location of the side tracks as they were then—that is, at the time of the accident.

A. There was no side track there north of the main track west of the freight depot. This track (indicating) was not there. There are some tracks here running into the freight-house, but these around here are about the same.

136 Q. How as to the switches—these two east of the place where the collision occurred?

A. They were there at that time, I think, but I cannot state positively. That switch has been moved, either before I was hurt or since, further east.

Q. Further that way than at the time it occurred, you cannot exactly say that all the switches that are there now were there then?

A. No, sir.

Q. They are substantially the same?

A. They are principally the same.

Q. When was it that you quit work before this accident occurred?

A. I think that it was the 14th of October. It might have been the 13th; either 13th or 14th was the last day's work I done for the N. P. Railroad Company.

Q. I just asked when you quit work. What did you say your age was?

A. I was 56 the 12th of last May.

Q. Now you say that you looked for the train as you approached the crossing. Where were you when you looked?

A. I was in the buggy.

Q. Whereabouts was your buggy?

A. The buggy was approaching the crossing. After the train went out of my sight I listened for the train as I moved along towards that crossing and all the time until I saw the train running on to me.

Q. Were you looking for it all of the time?

A. Well, I had no use trying to look through the box cars.

Q. Were you looking all the time?

A. I was looking as soon as I came to a place where I could look.

Q. Why did you look as soon as you came to a place where you could look?

137 A. I don't know hardly how to answer that question. It is supposed any man would look when he thought there might be possibly danger.

Q. You looked, then, as soon as you came to a place where you could look because you thought there might possibly be danger?

A. Yes, sir.

Q. You could not look until you got on the track where you could not get away?

A. Until I got between the tracks, my horses were on the tracks. My horses were on the track before my hind buggy wheels left the track, and the hind wagon left the track.

Q. What kind of weather was that?

Andrews: We think that is immaterial.

Q. Clear or cloudy?

Court: I will not rule it out on that ground.

A. I think that it was clear.
Q. Was it stormy?
A. No, sir.
Q. Calm weather, not windy or stormy?
A. Well, it was not what you would call a stormy, blustery day; there might have been a little breeze and there might not.
Q. Did you not say on your examination before that it was a calm day?
A. I would call it a calm day; there might have been a little breeze. I would not say that there was no wind at all; no breath of air; a calm day.

138 Redirect examination.

Questions by **Andrews**:

Q. I desire to ask you if you desire to qualify that answer in any way. I would like to ask you if you simply drove onto that crossing and over it without doing anything except walk the horses part way and then slapped them up when you saw the danger.
A. I thought I stated the balance. It don't require any exertion for a person to listen and to look. I looked and listened and used all the care I could for the train. If that is what you mean that is what I did.
Q. State if you did that all the time you were on the planking.
A. I did so; yes, sir.
McNaught: You simply stopped your horses from a trot into a walk?

Andrews: We object. The question is not legitimate re-examination.
Court: Go on.

Q. You simply stopped your horses from a trot to a walk, and that was at a time when these three teams were crossing the track, was it?
A. Yes, sir; and I listened for the bell and I looked for the train and I heard nothing.
Q. When your horses were going along?
A. Yes, sir.
Q. And when these other teams were crossing the track?
A. Yes, sir.

139 JAMES D. NELSON, a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Questions by ANDREWS:

Q. Where were you residing on or about the first of November, 1883?

A. In Sprague.

Q. Do you know the location of railroad and B street there?

A. Yes, sir.

Q. Please examine this plat and state whether or not it is a correct plat of that situation; and, if not correct, state in what respects it is incorrect.

A. I believe that is about as it is located there.

Q. What situation does the warehouse occupy with reference to B street or the freight depot lying on the north side of the railroad?

A. You mean where it comes to the street?

Q. Yes, sir.

A. Well, I do not know exactly the distance, whether it is on the line of the street that runs clear through. I know that it comes down pretty well here to the crossing and the approaches that run up.

Q. What is your recollection as to its being on a line with B street?

A. Well, I think that it is pretty near on a line with B street.

Q. How high is that building?

A. Well, I should judge, 12 to 14 feet.

Q. Above the walk or above the ground?

A. Above the ground.

Q. Did you observe any box cars on that day on the side track?

A. Yes, sir.

Q. State to the jury the situation of the box cars.

140 A. Well, those box cars came down pretty near. They came below that approach.

Q. How far below the approach?

A. I should judge that it was 2 or 3 feet; something like that.

Q. State as to whether or not they impinged on the planking, if any, and, if so, how far on the planking on B street.

A. Well, perhaps two or three feet.

Q. How many cars were standing on the side track next the warehouse?

A. Well, I could not say as to that, but there was quite a number of them. I should judge four or five, at least.

Q. Could you say positively, Mr. Nelson, that there were less than four?

A. No.

Q. You could say that there were four at least?

A. Yes; I should judge that there was four or more, probably.

Q. Now, did you observe a train passing from west to east?

A. Yes, sir.

Q. Did you observe how far the train went east?

A. No; I did not.

Q. You did not observe how far it went east?

A. Well, it was quite a piece up. I could not tell exactly. I saw it when it passed up.

Q. Well, to the best of your recollection, how far did it go?

A. Well, I should judge that it went up to the line of the superintendent's office.

Q. Point on the plat where Mr. Evans' office is.

A. It stands over here somewhere (indicating). It is above all these switches.

141 Q. I will call your attention to that plat. Do you recognize the location now?

A. That building that stands out from the shops is Mr. Evans' office.

Q. What building is that?

A. Well, those are offices of the time-keeper.

Q. Now, is that the building that you were speaking of at this time?

A. Yes, sir.

Q. Now, state to the jury how far east the train went.

A. Well, I should judge that it ran up somewhere near there (indicating).

Q. On which track did it run?

A. Well, I am not sure whether it was on the main track or this track. I was standing down here when it passed me.

Q. I would like to ask you, Mr. Nelson, when you say the train went up that far that you mean that there was that much clear track left?

A. Well, as near as I could tell. I could not tell whether the back end of the train went up that far.

Q. Take this pencil and mark on the plat as far east as you think the train passed, so as to leave a clear track west of it.

A. I could not say whether the whole of the train had gone that far, but somewhere on that line was the last I saw of it, and then I did not see any more of it until it came pretty near back to these box cars.

Q. Did you notice how fast it was running, Mr. Nelson?

A. Well, it was going middling fast.

Q. Well, by middling fast what do you mean? State it in miles and hours as near as you can.

A. I should judge that it was 15 to 18 miles an hour from what I could tell by riding. I could not tell very close.

Q. That was when it was approaching west again?

142 A. They sometimes run that way when they want to make a flying switch.

Q. Did you see Holmes on that occasion?

A. Yes, sir.

Q. Now, state what you saw with reference to Holmes and the collision that occurred there at that time?

A. Well, the first I saw Holmes he had turned around. I saw him when he went up, and did not see him again until he got the buggy turned to cross the track, and there were other teams crossing at the same time, and I saw him coming across, and I did not pay any particular attention to him at that time until he got his horses on the track, and then I had a notion to hallow to him to stop, but the horses had got so far on I thought best not to say anything to him.

Q. State whether he was in danger then, when you first noticed him.

A. No; I did not notice any cars when I first saw him.

Q. Where was he when you first saw him?

A. When I first saw him he was just turning here on that planking.

Q. Was that the same then that it is now?

A. Well, I do not know that it is exactly.

Q. Your recollection is that he was getting on that planking at the time that you first saw him?

A. Yes, sir.

Q. Where were you standing at that time?

A. I was standing about thirty or forty feet below this switch. I was talking with a couple of other men—Mr. McGee.

Q. Who besides McGee?

A. There was another man; he was from Lewiston. I do not recollect his name. He went away the next day.

143 Q. You noticed Holmes when he was first getting on that crossing; then when did you next notice him?

A. I saw him—I saw him all the while.

Q. Then tell the jury what he did.

A. Well, he came up on the track in a little trot or up to where he kind of checked up, and then kind of started up; these other teams was passing, and he started up and he got so far on the track when I noticed that car backing down that I was going to hallow for him to stop, but it was too late, so I did not say anything to him about it, and I saw the car strike the buggy and then pass right on down. I started and ran up around in front of the car to cross over to get over on the other side the cars were going on down and then I saw no more; and went after my team.

Q. You say that you saw the collision?

A. Yes, sir.

Q. Well, now, what was it that knocked Holmes' buggy over?

A. Well, it was the cars backing down and struck the wheel. The end of the box car broke two or three spokes out of the wheel where it struck it.

Q. Did you see what happened to Mr. Holmes?

A. It struck it and slid it down the track before the buggy left the track.

Q. What did you see happen to Holmes?

A. Well, the last I saw of him he was going up out of the buggy, and I ran up, and the cars passed, and I did not see him light. I saw the buggy turn and strike against the switch, and I saw him going out and the team start to run, and by the time I got over there the team had struck the sidewalk, or before I got there it struck the sidewalk and parted from the buggy and gone on down the street, so I went on down and caught the team, and then I put the team up and went back to see if he was hurt.

144 Q. How far, Mr. Nelson, did the car throw Mr. Holmes when it struck him?

A. I could not tell you.

Q. You did not see him fall?

A. No, sir.

Q. Did you see him before he was picked up?

A. No, sir.

Q. Do you know how long it was before Holmes became conscious after receiving the injury?

A. Well, I saw him in there. I was in there in two days. It was the second or third day I was talking with him.

Q. How fast was Holmes driving when you first saw him?

A. When I first saw him?

Q. Yes; when you first saw him approaching the crossing?

A. They were on a little trot, I think. I should judge just moderate.

Q. About what rate of speed? Tell the jury.

A. Then as he drove up he kind of slacked up, the other team crossing. He turned pretty well out towards that side. It was pretty well crowded.

Q. How many teams were there on the south side of the crossing and what were they doing there?

A. Well, I only noticed one team particularly.

Q. Who did you notice?

A. Breslaun's.

Q. What did you notice him doing?

A. Driving across the track. He had been standing on the opposite side of the track waiting to pass over.

Q. How soon after the car had passed from the west, going east, did Breslaun undertake to make the crossing after the track was cleared?

145 A. Well, I do not think that it could have been but a minute or two.

Q. State whether he waited some time or attempted to cross right away.

Q. Who—Breslaun?

Q. Yes.

A. Well, I think it was very soon after the train had passed up. There was another team, but I did not notice it particularly. I could not actually swear whose team the other was.

Q. Do you recollect having seen the team?

A. I know Breslaun.

Q. Do you know what the custom of the defendant at that time was with reference to ringing of the bell of the locomotive when approaching crossings?

A. Yes; they are generally ringing the bell.

Q. State whether that is the custom or not.

A. Yes; that is the custom.

Q. Were you in a position that if the bell had been ringing on that occasion you would have heard it?

Turner: We object.

Andrews: I am willing to apply——

The Court: I ruled awhile ago that you were to show all the conditions and not leave it to the judgment of the witness whether he could hear or not.

Andrews: If your honor please, I have asked the witness where he was and his proximity to the train at the time it was approaching.

Q. I will ask you, Mr. Nelson, if you were in possession of ordinarily good hearing faculties?

A. Well, I think I would have heard it if it had been ringing.

Q. I would like you to answer the question yes or no. Were you
at the time of the accident in the possession of ordinarily
146 good hearing faculties? Could you hear as well as other
men?

A. I don't know; I know I hear as well as some men.

Q. Well, as the majority of men?

A. Yes. I did not hear the bell. When I cross myself I always depend on that.

Q. Now, Mr. Nelson, you may answer the question whether or not you could have heard the bell or not had it been ringing on that occasion?

A. Well, I think I could.

Q. Did you hear it?

A. I did not. If I had I should have been more apt to stop the team.

Q. Did you notice Romick on that occasion?

A. I did not.

Q. Did you know him?

A. I know him well.

Q. You say you did not notice him?

A. I noticed at the time of the accident—I noticed a man at the switch. I do not know who it was.

Q. Where did you notice him?

A. Right close up to the switch—not a great ways from it.

Q. Did you notice whether he was operating the switch?

A. No, I did not.

Q. Did you notice which way he was facing?

A. Well, I think that he was facing the track, as near as I could judge, looking across that way. These teams were crossing, he may have looked at them.

Q. Were you in a position had any one been on the approaching
train, the colliding train—if any one had been on the rear of that
train for the purpose of looking out or otherwise?
147 A. Standing on the train?
Q. Yes, sir.

A. Yes, I could have seen them.

Q. State whether or not you saw any one.

A. I saw no one.

Q. Now, Mr. Nelson, did you see or hear any notice or warning given by the defendant or its employés as to the approach of this train at the time of the collision?

A. Give orders?

Q. Give notice?

A. No, I did not.

Q. There seems to be some confusion. Did you testify how fast this train was running from east to west at the time of the collision?

A. I do not recollect; I do not know but I did.

Q. Well, sir, how fast was it running at the time of the collision?

A. That is more than—that is all guess-work with me.

Q. Well, to the best of your knowledge?

A. I might guess one time 12 miles an hour and look at a train running the same gait and guess 15 miles an hour.

Q. Can you say whether or not it was running above the usual rate of speed?

McNaught: We object to that.

Court: I think you had better prove how fast it was running. The witness has already said how fast it was running.

Andrews: I asked him especially with reference to the time it was running west.

Court: Your former question was directed to the time the train was going east.

148 Q. Will you now testify, Mr. Nelson, to the best of your recollection, as to the rate of speed it was traveling at the time of the collision?

A. Coming back?

Q. Yes, sir; immediately prior to the time of the collision.

A. I do not think that it was going quite so fast coming back—probably not over 12 miles an hour then, but not quite so fast as it went up.

Q. Do you know whether or not there is any grade along the place of collision, Mr. Nelson?

A. Any grade?

Q. Yes; to the railroad.

A. Yes; there is quite a grade coming up this way.

Q. Then the incline would be towards the west?

A. Yes, sir.

Q. Do you know what the grade is?

A. I do not.

Q. State to the best of your knowledge.

A. Well, I do not know that I can state. I know it is quite a grade. The cars run down over it very free when they are let loose.

Q. Do you recollect anything about the crossing on the other street at the time of the collision?

A. Yes, sir.

Q. State whether or not it was obstructed. State what you recollect.

A. It was; had been, I believe, for a few days.

Q. What was the population of Sprague at the time of the collision?

A. About between seven and eight hundred.

Q. Can you state to the jury the proportion of people living on each side of the railroad at that time? 149

A. Well, I should judge about one-quarter of the population.

Q. One-quarter of the population resides on each side?

A. Resides on the north side.

Q. Did you ever make any observations as to whether or not a person in passing over this crossing could have seen such a train as that you described approaching the crossing—a person in Holmes' position?

A. Yes, sir.

Q. What was the result of your investigation, Mr. Nelson?

A. Well, you could not see anything coming down until you passed them.

Q. How close would a person have to be to the track on which the colliding train was running before he could see the approaching train?

A. Well, he would have to be within—I do not think that he could have seen the train there unless he stood within a few feet of the track.

Q. How many feet?

A. I don't think he could see the train unless within six feet—that is, where it went by.

150 Cross-examination.

Questions by McNaught:

Q. You stated, I believe, that you were talking to some persons at the time this train was passing by?

A. Yes, sir.

Q. Did you continue talking to that person until about the time you saw the danger that Holmes was getting into?

A. Well, it was about the time that I saw Holmes drive around to cross the track; that is about the time.

Q. About how far from the crossing was Holmes when you stopped talking to the person with whom you were talking?

A. How far was he from the track?

Q. Yes, sir.

A. Well, he was driving right on then.

Q. Driving right onto the track?

A. Yes, sir.

Q. Up to that time, then, you had not paid any great amount of care or attention to what was going on, either to Holmes or the train?

A. No; but then I was just looking after the team. I was going over to take care of it. It was my team at that time.

Q. Now, you say that Holmes was driving in a trot until he got just onto or near to the crossing?

A. Until he got near the crossing.

Q. How near?

A. Well, until he struck where the road crosses. I can show you here. He came down here on a little trot, and then about there, I think, his team struck a walk, and then he started up again. He started them up, and they both sprang. They heard these cars, the horses did, and they sprang.

Q. When the horses got onto the main track or onto the side track where the box cars were then they saw the train and then they sprang?

151 A. Well, I expect that it was the train; I don't know. They got excited and started. I noticed the train then coming down. The only change in his gait was first to stop from a trot to a walk, and then when the horses sprang forward, when they were on the planking and got into a trot.

Q. How fast did they go after they got on the planking when they sprang forward?

A. They both gave a pretty good spring to cross the track.

Q. You thought from the appearance of the horses that they had heard the noise?

A. Well, of course they must have heard it right there.

Q. And they were frightened?

A. They just made one jump and the car was right there.

Q. Do you know what the distance is between the two tracks?

A. Well, I should judge five or six feet—no; it is not that. I do not think that it is over four feet—that is, between the two inside rails.

Q. What is the distance between the inside rails of the side track on which the box cars were and the main track?

A. Well, I should judge about five feet.

Q. Ever measure it?

A. No, sir.

Q. You were examined before in this case, I believe, Mr. Nelson?

A. Yes, sir.

Q. Did you not state on your previous examination that you did not pay much attention to the train after it passed east until just as you saw the horses coming onto the planking or substantially that?

A. Did not notice the train.

Q. That you did not pay much attention to the train
152 after it passed east?

A. I saw it pass.

Q. Did you not also state in your examination before that you could not tell how far east of the crossing that train went?

A. No; I think I stated it went up about that distance, as near as I could recollect.

Q. About how far is that distance east of the crossing?

A. Well, it is very near to Evans' office, I should judge; of course, a man was not paying much attention and would not give a very close estimate; I am only giving as near as my recollection can recollect about it.

Q. What was the distance?

A. Well, probably about thirty or forty rods—fifty rods.

Q. Then you state now that you were not paying much attention to the train and paying but little attention until you saw your horses were getting into danger?

A. I just saw the train going up; just that much attention as it went by me.

Q. And then when you saw it coming back and your horses getting in danger you paid a little more attention?

A. I was interested to see whether they got over or not, but the train came back so quick I did not have a chance to stop them when I saw the danger.

Q. You state that you could not tell whether there was a four-horse team passed over before the two-horse team or not after it went east?

A. I would not testify to that. I knew one man; I saw him standing there some time.

Q. After the train passed up?

153 A. No; before the train; before he could get across—Mr. Breslaun.

Q. How long did you say that he remained there after the train had passed up east?

A. Well, I do not think he was but a few minutes. I don't know that it was more than a minute; I could not say.

Q. The train, you say, was not coming down or going west as fast as it went east?

A. No, sir; I do not think so.

Q. I believe you stated that in going east you thought it was going 15 to 18 miles an hour?

A. Yes; I should judge that it was going up pretty lively.

Q. And coming west you think it was going about 12 miles an hour?

A. Yes; I do not think that it was going quite so fast coming back.

Q. You do not pretend to be an expert about the speed of a train, do you?

A. No, sir; I could not speak closely about it at all.

Q. What was the height of that buggy that Mr. Holmes was riding in that day?

A. Well, sir, it is about nearly five feet high.

Q. To the top of the seat?

A. I think it is.

Q. That is, the cushion on the seat?

A. Yes, sir.

154 Redirect examination.

Questions by Andrews:

Q. Did you ever measure that buggy?

A. No; I never did.

Q. It is mere conjecture on your part?

A. Yes, sir.

Q. I will ask you if it is the ordinary-sized buggy.

A. Well, I think it was about two inches higher than the ordinary-sized buggy. It is one of those thorough-braced buggys.

Q. Describe that to the jury.

A. The brace that runs around under the end of the box sets on each end of the brace, same as the Concord-made buggy. The braces run clear around and they were made of leather and the bed set right onto the ends where this goose-neck comes over.

Q. How high did you say that was higher than ordinary buggies?

A. I think it was about 2 inches.

Q. Do you think that it was any more than that?

A. No, I don't think it was—that is, the seat; the body set up higher on the spring.

Andrews: There is a question that I wished to ask on direct examination and I would like to recall the witness for that purpose.

Q. Did you ever work with Mr. Holmes before he was injured?

A. Yes, sir.

Q. Did you know what his condition was physically?

A. Well, yes.

Q. What was it?

A. He appeared to be — able-bodied man; done as much as any of the rest of us.

155 Q. Do you know what wages he was getting or capable of earning at the time he received the injury?

A. He was getting the same as the balance—three and a half a day.

Q. Did Mr. Holmes ever have your team before that time, Mr. Nelson?

A. Yes; quite often.

Q. How did you consider him as to being trustworthy and expert in the management of a team?

McNaught: We think that is objectionable.

The Court: I do not think you need prove that.

Cross-examination.

By McNaught:

Q. You stated that he was an able-bodied man at that time. You do — pretend to be a physician?

A. Well, I did not know that he was anyways sickly; never heard him complain. He used to do some pretty heavy lifting.

Q. You are not a physician and never made an examination of him?

A. No, sir. I never made an examination of him; no more than just worked with him.

156 LEONARD SKELTON, a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Questions by ANDREWS:

Q. What is your name?

A. Leonard Skelton.

Q. How old are you?

A. 14 years old past.

Q. Do you know James Holmes?

A. Yes, sir.

Q. Were you living at Sprague at the time he received an injury in consequence of a collision with the Northern Pacific?

A. Yes, sir.

Q. Where were you at that time?

A. At the corner of the post office; standing at the corner.

Q. Where is the post office? Point out on the diagram where the post office is. I will ask you if Murphy and Burns' place is the post office.

A. Yes, sir.

Q. Was that where you were standing?

A. Yes, sir.

Q. Did you pay any attention to that train?

A. Yes, sir.

Q. At the time of the collision?

A. Yes, sir.

Q. Did you notice it while it was moving from the round-house or in the direction of the round-house down towards the Big lake?

A. Yes, sir.

Q. Did you notice what they were doing?

A. Yes, sir.

Q. Well, what were they doing on the train?

A. Well, the fireman was ringing the bell as he was going
157 down and they stopped at that switch and as they were going back they did not ring the bell.

Q. What do you mean by going back?

A. Towards the round-house.

Q. Did you see the train at the time that Mr. Holmes was hurt?

A. Yes, sir.

Q. Well, state whether or not the bell of the locomotive was being rung that time.

A. It was not ringing.

Q. How long before that had it been ringing?

A. Well, I don't just know how many minutes it was, but they were backing up again without ringing it.

Q. How long had you been noticing the train, Leonard?

A. Well, ever since it came down the track as far as I could see it.

Q. Well, how far was it away from Holmes when you first saw it; how far away was the caboose when you first saw it?

A. I don't know just how far it was.

Q. Well, as far as across this room?

A. No; I guess it was further than that.

Q. How much further?

A. About twice, I guess.

Q. Well, when you first saw it was the bell ringing?

A. As it was coming down from the round-house it was.

Q. Well, how many motions did you see that train make; how many times did you see it pass up and down over that track?

A. It went down just once when this accident occurred.

Q. Well, how far away from Holmes was it that you observed that the bell was ringing?

A. Well, it was about 50 or 60 yards.

158 Q. That is all you know about that matter, is it?

A. Ye-, sir.

Cross-examination.

By McNaught:

Q. Which way was that train going when you first say it?

A. Down towards Big Lake.

Q. Which way is that?

A. It is towards the west.

Q. And then, when you saw it the next time it was going east, was it?

A. Yes, sir.

Q. Towards the round-house?

A. Yes, sir.

Q. That was when the bell was not ringing?

A. Yes, sir.

Q. That was when the collision occurred?

A. Yes, sir.

Redirect examination.

By Andrews:

Q. Did you say to the jury that the train was going east or west when they hit Holmes?

A. It was going east when it hit Holmes.

Q. When it hit Holmes?

A. Yes, sir.

Q. That is your recollection of it?

A. Yes, sir.

159 Edward Peterson, a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Questions by Andrews:

Q. Where were you residing on or about the first of November, 1883?

A. Down in Sprague.

Q. Did you know James Holmes at that time?

A. Yes, sir.

Q. Did you witness a collision between a buggy that Holmes was riding in and the car of the Northern Pacific railroad on that day?

A. I was right on the track at the time it happened.

Q. Where were you, Mr. Peterson?

A. Well, I stood right on the crossing.

Q. Look at that and see if that is a true plan. Now, point out on that, supposing this to be the planking across here, where you stood at the time of the collision?

A. I stood—there is a track that runs out here and stops; that is where I stood. There is a track that stops; that is where I stood.

Q. Did you see Holmes at the time he approached that crossing?

A. Yes; I did.

Q. Did you notice whether or not there was any box cars on that side track at that time?

A. Any box cars on that track at that time?

Q. Yes; did you notice any?

A. There were some cars set there. I do not know whether they were box cars.

Q. You cannot say whether or not they were box cars? Now, did you notice how far on this crossing here, if at all, these cars impigned?

A. Which car do you mean?

160 Q. This car here, this box car (indicating on diagram).

A. That came from the freight-house?

Q. Yes, sir.

A. I cannot say.

Q. You paid no attention?

A. No, sir.

Q. Mr. Peterson, did you pay any attention to the train approaching from the east towards the west, approaching the crossing?

A. You mean going up?

Q. Going from the round-house towards the lake.

A. Yes, sir.

Q. Did you notice how far that train went east before its motion was reversed?

A. After it struck the buggy?

Q. No, sir; before it struck the buggy.

A. No; not exactly.

Q. You did not notice that?

A. No, sir; they came from the round-house to the crossing when they struck the buggy, and I think that is the only time when it went down first.

Q. You think that there was another train went down before it?

A. Yes, sir.

Q. We are not enquiring about that; did you see the collision?

A. Yes, sir.

Q. State to the jury what you saw and how you saw it.

161 A. Well, I crossed the track when the train went up, and the train went up to about that livery stable and the brakeman or fireman went off and changed that switch and they came back again. I stayed there and Mr. Holmes he came by, and I hallowed, and the minute I hallowed the train came pretty fast. I hallowed to him to stop and I was afraid he heard me; he did not hear me. I thought he would have stopped the team and he would have been killed right in the middle of the track; he went across and the train stopped right there and I met the fireman. I was going across the engine. I went back again. That is all I know about it.

Q. You say something about meeting the fireman.

A. Yes, sir.

Q. Where was the fireman?

A. Well, when I was going over I saw the buggy struck with that box car, and I was going across the engine; the engine was pretty near on the crossing, a little below. I was going across and I saw the cars were behind and some were in front. I met him there and I had to go back and go around.

Q. Was he in or out of the locomotive?

A. He stood on the steps; he came in.

Q. Who was that fireman?

A. I don't know; I don't know any fireman.

Q. Mr. Peterson, are you a man of ordinary good hearing?

A. Yes, sir.

Q. Was you in a position where you could have heard the bell of the locomotive ringing if it had been ringing on that occasion?

A. I think so.

Q. Well, answer it yes or no.

A. I was; yes, sir.

Q. Did you hear the bell on the locomotive ring on that occasion?

A. Well, no; I don't think I did.

162 Q. Did you at that time know Mr. Romick?

A. Yes.

Q. Did you notice him on that occasion?

A. I did not.

Q. You did not notice him?

A. No, sir.

Q. Did you notice any person at or near the switch just below the crossing?

A. Not on that side where I stood, except Nelson stood on the other side.

Q. Where did you stand—on the side towards the post office or on the other side?

A. On the side next the Pacific hotel.

Q. Well, did you notice any man near the switch nearest the post office?

A. No; I did not.

Q. Did not notice any one there?

A. No, sir.

Q. When did you first see Mr. Holmes?

A. When I first saw him in this country?

Q. No; on that occasion.

A. At the time he tried to cross you mean?

Q. Yes, sir.

A. Well, I saw him; he was pretty close. I was not looking for any team to come. There was two teams going past. He was trying to pass, and I hallowed to him. I did not see him before he was pretty near on the track.

Q. Well, where was Holmes—how far on the track—how close to the track—at the time you hallowed to him?

163 A. He was about three or four feet of the track, and his horses were on a little trot.

Q. Then I understand that when you hallowed the horses were on the track?

A. No; I don't know that they were; they were in two foot of the track; I know that.

Q. Did you notice how many teams there were on the south side of the crossing going north?

A. There were two teams; that is all I know.

Q. Did you notice whether one was a four-horse team?

A. Yes, sir. I know the man well—Mr. Fish. He had a four-horse team, and Mr. Breslaun had a two-horse team.

Q. You saw two men there?

A. Yes, sir.

Q. How long after the train had passed to the east was it before the foremost of these two men attempted to cross?

A. I could not tell that exactly, because I do not know.

Q. Was it a little while or was it immediately after the train had gone by?

A. Well, then, after the car goes by and a team is waiting they generally try to cross as quick as they can; that is as much as I know about it; they tried to cross as quick as they could.

Q. Did you notice, at the time the engine moved down by you, how many there were in the cab of the engine?

A. One.

Q. Do you know whether or not there was more than one?

A. Well, there was one on the side; he stepped up on the steps; that is all I saw; there might have been two; there was one fellow.

Q. Were you in a position to see if there were two in the cab?

A. Well, I ought to, because I was trying to get across.

Q. Did you see any one on the rear end of the train that was approaching the crossing at the time of the collision?

164 A. No; I did not see anybody.

Q. You did not see any one?

A. No, sir.

Q. Now, I want to call your attention to that bell particularly. State, if you know, whether or not that bell was ringing on that occasion at the time of the collision.

McNAUGHT: I think that he has answered that fully.

Q. I will ask you whether that is a mere conjecture on your part or whether you are positive about it.

A. Well, if there had not been four men swore that it rang, I would not dispute; I would not fight against four men.

Q. Then, as I understand, the only reason that you do not testify at this time that this bell was not rung is simply because four other men knew that it was rung.

A. Yes, sir.

Q. Well, I will ask you whether or not, to the best of you recollection and belief, that bell was ringing at that time.

A. I do not understand you, Mr. Andrews.

Q. To the best of your recollection and belief, was that bell ringing on that occasion?

A. No; I do not think it was.

165 Cross-examination.

By McNAUGHT:

Q. If I understand you, you were standing just south of the planking west of these box cars at the time that Holmes was attempting to cross?

A. Yes. Well, I don't know; there were some cars there; I don't know whether they were box cars; I stood right there.

Q. Well, here is the freight depot here (indicating) and the passenger depot here on this side, and you were standing right here by the side of the crossing?

A. Yes, sir.

Q. And you saw Holmes coming up in this direction?

A. I did not notice him until he was about two feet of this track—two feet from where I stood.

Q. You were standing on this side track?

A. There is no side track there; there is a dead track; it goes down so far and no further.

Q. Now, you say you saw Holmes coming up there, and when he was within two feet of where you were standing on that dead track you hallo*w*ed to him?

A. Yes, sir.

Q. And at that same time Fish and Breslaun were passing over with their teams?

A. Well, yes; I guess they were.

Q. Then you saw the train coming down and collided with Holmes' wagon, and the train stopped right there?

A. Yes; they did not stop right there; they went a little further.

Q. How far?

A. They went down—there was about four cars behind—
166 you might say that there was four cars and the engine—
they went down about 25 feet to the right of me; they came
from the left.

Q. The engine came down 25 feet past you?

A. I did not measure it, I think.

Q. Then the engine stopped there?

A. Yes, sir.

Q. You stated that you hallo*we*d to Holmes. How loud did you hallo*w*, Mr. Peterson?

A. Well, I don't know how loud I hollered.

Q. Well, give us a sample of it now. How loud did you speak?

A. Well, I hollered so I thought he would hear, but the train — coming so quick *but* I was sorry after I had hollered. If he had heard me he would not have any show at all to get half across.

Q. If he had heard you when the horses were in that position, within two feet of where you were, and stopped immediately?

A. There would have been no chance; he would have been killed right in the middle of the track; he could not have stopped the horses; he came in a trot; he came in a light trot.

Q. He was coming so fast that he could not have stopped the horses?

A. No, he was not coming so fast; he was coming in a small trot.

Q. Was he trotting all the time you saw him?

A. I only saw him as he came up there, about two or four feet of that side track.

Q. And his horses were trotting then?

A. Yes, sir.

Q. They continued to trot until the collision occurred?

A. Well, after he seen the train coming he tried to get across. I don't know whether he made them go any faster; I guess so; I would have tried to.

167 Q. Now, you say, Mr. Peterson, that your impression is that you did not hear the engine bell. Is it not customary when you are walking around there to ring bells? Don't you suppose many times the bell rings and you not notice it when you are going around Sprague?

A. Yes, sir.

Q. It is like the ticking of a clock, you get used to it?

A. No, not that way.

Q. Not quite so much as the ticking of a clock? You say that you cannot state whether that was a box car on the side track or not?

A. No, I did not pay any attention to the car.

Q. You stated that you thought that there was a train went down just before this train. About how long before this train went along did the other one pass?

A. About the time that other train went by there was a train went by. That train that went against that buggy was a switch-train.

Q. And just prior to that time another train had passed?

A. I think so; I would not be positive.

Q. You went around to where Holmes was, did you?

A. I tried to go across and I had to go around the train to get across when they carried him away. Rickards was one of them.

Q. Which way did you go around?

A. Right around where the depot is standing.

Q. You came around the passenger depot, around to the right?

A. Yes, in front of the passenger depot.

Q. Came around that way to where the accident occurred?

A. Yes, sir.

Q. Went clear around the train that collided with this team?

A. Yes, sir.

Q. I would like to ask you, Mr. Peterson, how far you went down to get around this train.

168 A. I don't know exactly how far.

Q. What part of the colliding train did you go by?

A. I went by the locomotive or one or two cars—maybe three.

Q. Your recollection is not certain as to how many cars you went by?

A. No, sir.

Q. You are certain that you went by the locomotive?

A. Yes; had to do that.

Redirect examination.

Questions by ANDREWS:

Q. Do you remember how many cars were in front of the locomotive, to the west of it?

A. Four.

Q. To the west of the locomotive; was not the locomotive next the caboose, and was not the caboose the furtherest west car of the train?

A. The car that struck Holmes, I think, was one of those red-painted box cars.

Q. Caboose car?

A. Box car; I don't know for sure; I think it was.

Q. Now, was not the engine next that car?

A. No.

Q. Was not that way?

A. No; I am satisfied it was not.

Q. How many cars were there between that car and the engine?

A. Four cars there, two flat cars, a caboose, and one of these red-painted box cars.

McNAUGHT: Mr. Peterson, do you remember whether there was any pilot on top of that box car or not, any glass lookout?

A. No; I don't.

169 MATTHEW BRESLAUN, a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Questions by ANDREWS:

Q. State your name.

A. Matthew Breslaun.

Q. You have been sworn?

A. Yes, sir.

Q. Did you witness the collision between the Northern Pacific railroad train and James Holmes about the first of November, 1883?

A. I did.

Q. Where were you? Just go on and tell the jury what you saw and how you saw it in your own way.

A. Well, I was standing at the post-office corner waiting for the train to pass by. I saw the train passing by, and there was a team ahead of me, and as soon as the train went by and that other team went on I followed him. I saw Mr. Holmes coming that way, and I had barely time to cross the track when the train came down. I met Holmes just as I got off the track.

Q. Did you see anybody on that occasion haveing charge of the switches in the yard?

A. I saw a man standing at the switch.

Q. Where was he standing at the time you went on the crossing?

A. He was standing at the switch.

Q. Where was he standing at the time you went over the crossing?

A. Well, he was still at the switch.

Q. Look at this plat and see if it represents the true location of the post office, B street, freight depot, &c. Look at it and see if it is approximately correct.

A. Yes; I should say it was.

Q. Now point to the jury where that person standing at the switch was.

170 A. That is the switch there?

Q. I suppose so.

A. That is where he was.

Q. When you entered upon the track where was he—when you were crossing?

A. He was at that switch.

Q. What was he doing?

A. Well, he was not doing anything that I noticed.

Q. Which way was he facing?

A. Facing north.

Q. Did you notice Holmes at the time you saw him facing north?

A. I did.

Q. How far was Holmes away from him at the time he was facing north?

A. Well, I could not exactly say.

Q. Where was Holmes when you first noticed him?

A. He was about making this turn here (indicating on diagram).

Q. Where were you when you noticed him?

A. I was just about—Mr. Fish was ahead of me and he was about on the track.

Q. When you first noticed Mr. Holmes?

A. Yes, sir.

Q. Where was Holmes at the time you first saw him?

A. He was about making this turn, as near as I remember.

Q. How far is that away from the railroad crossing?

A. 40 to 50 feet.

Q. Did you pass him on that occasion?

A. Mr. Holmes?

Q. Yes.

A. I met him.

Q. Where did you pass him?

171 A. I passed him right after I crossed the track.

Q. Which side of the crossing did you go over?

A. I went a little to the west of the center of the crossing.

Q. Now, what caused you to go so far west?

A. Well, this train approaching, coming down, and these box cars they stood here.

Q. How many box cars stood here?

A. I cannot say the number; I did not count them.

Q. How far did they run towards the west of the crossing, if any?

A. Well, they were on the end of the planking.

Q. How far on the end of the planking?

A. I could not say.

Q. You could not say?

A. No, sir.

Q. Well, did you drive as close to the box cars as you could without coming in collision with them—that is, the box cars on the side track?

A. No; I think not.

Q. How far was your wagon itself away from the box cars?

A. Well, I don't exactly know. My team shied a little to the west.

Q. Away from the cars?

A. Yes, sir.

Q. At what rate of speed were you driving?

A. Well, I was driving on a walk. I could not drive any faster for the team ahead of me.

Q. How close were you to Fish?

A. I was close to him.

Q. How long after the train had passed from the west to the east did Fish start to cross?

A. He started immediately when the train went by over the crossing.

172 Q. Do you recollect the car coming down from the east and going to the west?

A. Before the collision?

Q. Just at the time of the collision.

A. Yes, sir.

Q. Do you recollect what speed they were approaching?

A. Well, I could not say as to the speed.

Q. Was it slow or fast?

A. Well, it was middling fast.

McNaught: The question is hardly fair.

Court: I think he can answer that, whether it was going slow or fast.

Q. You say you cannot say how fast the train was going. How fast, about, was it going?

A. I could not say as to the speed of the train as to the miles per hour, if that is what you mean; but the train was going at a rather rapid rate.

Q. Did you notice how far east the train went so as to leave a clear track in passing from the west towards the east before it came down again?

A. Well, it went probably 150 feet.

Q. Point to the place on the plat where it went to.

A. It went up somewhere to here (indicating).

Q. So as to leave that much track expoosed on the west side?

A. Yes; I think it did.

Q. What track did it go up on?

A. I think it was the track next the track that the cars stood on.

Q. That is your recollection?

A. Yes, sir.

Q. Were you paying any attention to that train as it came down?

173 A. Yes, sir.

Q. Is your sense of hearing ordinarily good?

A. Yes, sir.

Q. Were you in a position that you could have heard the bell ringing if it had rung?

A. Well, I think I was.

Q. Did you hear the bell ring on that occasion?

A. Well, I don't remember if it rang. I don't remember of it. I would not say that it rang or that it did not.

Q. I will ask you, Mr. Breslaun, if you have any recollection on that subject as to whether or not——

McNaught: I think he has given a fair answer.

A. I have not any recollection.

Q. What kind of a team were you driving—a two or four horse team?

A. Two-horse team.

Q. Did you say that you saw the accident there?

A. Yes.

Q. Did you notice how far Holmes was thrown by the colliding car?

A. Well, he was thrown 20 to 25 feet.

Q. How did he light or how did he fall, on his shoulder or on his head, or both?

A. On both shoulder and head, as near as I could see.

Q. Did you get out of your wagon to go down to see him?

A. No, sir; I did not.

Q. Were you in such a position that if there had been any person upon the colliding train at the time it was approaching the crossing that you would have seen them?

A. Yes, sir.

Q. State whether you saw any person on the colliding train at and immediately before the collision or while the train was moving from the east towards the west.

174 A. You mean on the west end of the train?

Q. Yes.

A. No, sir; I saw no person there.

Q. State to the jury what warning, if any, was given by the defendant of the approaching train over the crossing.

A. There was not any warning given that I heard.

Q. Well, I will ask you not only with reference to what you heard but what you saw. Did you see any warning given?

A. Well, I was in a different position from what Holmes was. I saw the train coming down. I saw the train approaching, and Mr. Holmes could not.

Q. What was the reason that Holmes could not see the approaching train?

A. There was box cars and the building obstructed his view.

Q. State whether that partially obstructed or wholly obstructed his view.

A. Well, they wholly obstructed his view until he got on the track or very near the track.

Q. Did you notice Holmes at the time he slapped his horses on the back?

A. I did.

Q. Where were his horses at the time; how near the track that the collision occurred on was he at the time he slapped them on the back with the lines?

A. They were very near on the track if they were not on it.

Q. Are you able to say whether they were or not on the track?

A. I could not say.

Q. If they were not on the track how close were they?

A. They must have been within a few feet of it.

Q. Few feet; how many?

175 A. Well, two or three feet.

Q. Did you hear any remark made about this time as to what might happen to your wagon if you did not hurry up?

A. I did not.

Q. Did you hear any remark by any person?

A. Not at the time; no.

Q. How close did the car come to your wagon wheel as you passed over?

A. Well, I should judge eight to ten feet.

Q. That is your best recollection?

A. That is my best recollection.

Q. About what rate of speed—you are a farmer, are you?

A. Yes, sir.

Q. About what rate of speed was your team traveling at the time you started to cross the planking and at what rate did they continue to travel until the collision occurred?

A. They traveled on a good, fast walk.

Q. How fast was it—how many miles an hour?

A. Probably four miles an hour.

Q. How fast was Mr. Holmes' team traveling or walking at that time?

A. About at the same rate of speed.

Q. Might they have been traveling faster?

A. Well, they might have been.

Q. You are not positive about that?

A. No.

Q. Do you know, Mr. Breslaun, what the custom was in Sprague, the custom of the defendant, with reference to ringing its locomotive bells at crossings?

A. I do not.

Q. As a means of giving warning?

A. No, sir.

176 Cross-examination.

Questions by McNaught:

Q. How far was your wagon when you were standing still on the south side of the track from the crossing, as the train was going east?

A. About sixty feet, I should judge, to the best of my knowledge.

Q. In going from there to the crossing what gait did your horses go, at a walk or a trot?

A. Well, I might have trotted some part of the way. Fish started out and I started after him. I kept up to Fish to cross the track. When I saw the train approaching me I hurried to get across. I could not get across any faster on account of Fish being ahead of me.

Q. How far from the crossing on the north side was Mr. Holmes when you first saw him?

A. 40 to 50 feet, to the best of my recollection.

Q. You stated that no warning was given Mr. Holmes that you heard. Did you not warn him that the train was approaching?

A. I could not warn him when I was not right to him. I tried to warn him when I met him.

Q. When you got near to him what did you say?

A. Well, I don't know that I said anything really.

Q. Did you not state, Mr. Breslaun, on your examination before, that you did say something to him—that you did warn him?

A. I think not. If I did I do not remember it.

Q. What did you do towards warning him, if anything?

A. Well, I don't know that I done anything really.

Q. But you stated that you tried to warn him. Now, refresh your memory a little and see if you cannot think what you did?

177 A. Well, I disremember doing anything.

Q. You do not remember at all now whether you called to him or not—told him to look out for the train?

A. I may have said "Ho!" or "Stop!" or something of that kind. I do not really remember.

Q. Just where on the planking did you pass him? He was on the planking when you did pass him?

A. Yes; he was on the planking.

Q. Did you see him all the time from the time that he was within 60 feet of the crossing up to the time the collision occurred?

A. Well, I don't know that I paid attention to keeping my eye on him. I was watching for the train.

Q. Looking out for yourself a little bit. Did you observe the rate he was traveling, whether walking or trotting his horses?

A. When I first noticed him?

Q. Yes.

A. If I remember right, he was trotting when I first noticed him.

Q. Did you notice where he changed his horses from a trot into a walk?

A. Well, I don't really know, but I was watching — train; my horses shied; my team was scarry; bothers me some to manage it.

Q. And you say that your team as you passed over was nearer the center or west part of the planking?

A. Yes, sir.

Q. And he passed over the planking west of you?

A. Yes, sir.

Q. He must have been, then, very near the west edge of the planking?

A. I should judge so.

178 Q. Was not one of his wheels or one side of the wagon oft the planking entirely?

A. No; I think not.

Q. Think they were on the planking?

A. Yes.

Q. You stated that you saw him fall, and he fell some 25 feet from the train. How did you happen to see him fall?

A. I saw the car strike the buggy, and I saw the buggy upset or throw him out, not upset really but I saw him leave the buggy.

Q. Which way were you going?

A. I was going north.

Q. You looked back and saw the car strike him?

A. Strike his buggy.

Q. Was not the car then between you and Holmes?

A. Yes, sir.

Q. He fell off, then, to the west so that you could see him?

A. Yes; he fell to the west.

Q. Did you see him when he struck the ground?

A. Well, I don't really know as to that; I think I did.

Q. Did you notice whether the wagon turned over or righted up?

A. It righted up, as near as I could judge.

Q. Well, did you after you passed over take off to the west or did you go directly north?

A. I went directly north for a ways and stopped as soon as I could.

Q. Did you go around to see Mr. Holmes after that?

A. No, sir.

Q. Did you see him when he was on the ground?

A. I did.

Q. After you stopped?

179 A. Yes, sir.

Q. Did the horses become detached from the buggy that he was in?

A. I could not say what the horses done afterwards.

Q. How was that train made up, how many cars, and on what portion of the train was the engine?

A. I could not say just how the train was made up.

Q. Did you notice whether the engine was near one end of the train or was it near the middle?

A. I think it was near the middle. I could not say whether it was the middle. There was cars behind and cars ahead of it.

Q. You stated that you did not know how fast the train was moving as it was going west.

A. I did.

Q. Mr. Fish's team you stated was a four-horse team?

A. No, sir; I did not.

Q. You think the team ahead was not a four-horse team?

A. Yes, sir.

Q. It was Mr. Fish's team, was it?

A. I suppose it was.

Q. He was driving it?

A. Yes, sir.

Q. Did you notice as you were driving over the track any person standing just west of the crossing and near to it?

A. There may have been some men standing there.

Q. But you did not observe any?

A. No, sir.

Q. Were you standing with your team right in front of the post office?

A. Well, the post office faces to the north, and I would be standing away around the post office on that street. I would not
180 be in front of it.

Q. How far from the post-office building?

A. Probably 25 feet.

Q. How far from you was Mr. Fish all the time he was driving?

A. Right ahead of me.

Q. How far from you?

A. Well, my team was right up against his wagon, just about.

Q. Did you notice the kind of a car that was at the west end of the train that collided with Mr. Holmes?

A. Yes, sir.

Q. What was it?

A. It was a caboose car.

Q. Did you notice what color it was painted?

A. I think it was painted yellow.

Q. It has a pilot on top of it?

A. Yes, sir.

Redirect examination.

By ANDREWS:

Q. Do you remember particularly the color of the caboose?

A. I don't just remember exactly the color.

Q. Might it not have been red?

A. It really might have been.

McNAUGHT: It was a caboose?

A. Yes; that is what it was.

181 RICHARD FISH, a witness for plaintiff, after being duly sworn, testified as follows:

By Mr. ANDREWS:

Q. Mr. Fish, were you at Sprague on or about the first of November, 1883?

A. I was.

Q. Did you witness a collision between a buggy James Holmes, the plaintiff here, was riding in and a car of the defendant?

A. Yes, sir.

Q. Relate the circumstance just as you saw it, Mr. Fish.

A. I was in Sprague. I was going to cross the railroad and there was some cars backed down, and I had to stop there and wait for them here, and after a while they pulled up and I started across and just got across the main track—just across the end of that track where these cars stood, and I saw Holmes coming down the street the other way.

Q. How far was Holmes away from the crossing when you saw him first?

A. Well, probably 70 or 80 feet when I first noticed him.

Q. Look at that plat and see if you ever saw it before?

A. I think I saw this plat here before.

Q. Last term of court?

A. Yes, sir.

Q. Is it a correct plat of the situation there at that time?

A. I think it is.

Q. Now, point to the place where you were at the time the train went from the west to the east?

A. This is where I was (indicating). I was just in front of these cars, just across in front of these cars, had not got off the platform yet when the train came down.

182 Q. I asked you or intended to ask you where you were at the time the train passed from this track this way?

A. I was here (indicating near the post office). I was waiting to get across.

Q. You saw some other train of cars?

A. When I was here the train stood in front and then she shoved the train up here, then I crossed.

Q. Did you notice how far up this way this train was pushed?

A. I did not. These box cars — there as I went across the track. I could not see the train.

Q. Did you notice how many box cars were standing in here?

A. I did not; there was quite a string of them.

Q. Did you notice how far, if any, they impinged upon the planking?

A. When I drove across there they were so far over that my horses kind of shied from it.

Q. Did you notice whether or not they were on the platform or not?

A. I think it was about the end of that incline chute that runs down there from the warehouse.

Q. About to that chute?

A. About the end of the chute, where it comes to the main track.

Q. Where was Holmes when you first saw him?

A. Just coming onto this platform.

Q. At what rate of speed?

Q. When he was coming down here he was on a trot. He stopped his horses when he got about there; kind of halted them up. I was going across here.

Q. Do you recollect whether the planking from there down to there (indicating) was the same as it was at the time of the collision?

183 A. I rather think not, because at that time this side track here—they were grading this side track; this crossing here was stopped up; that is the reason that I stopped here. This platform, I think, has been built since that track has been put in there.

Q. Well, now, do you mean to say that Holmes was about this place (indicating) when you first saw him?

A. He was coming around there just about there.

Q. And not yet upon the planking?

A. No, sir.

Q. Did you say at what rate of speed he was driving?

A. He was on a slow trot.

Q. Tell the jury at about what rate of speed.

A. Well, I am not much of a judge, but I should think he was going four or five miles an hour.

Q. You are accustomed to driving horses?

A. Have been ever since I was a boy.

Q. Such horses as Holmes was driving?

A. Yes, sir.

Q. You know probably about what rate of speed they were traveling on that occasion?

A. I should think between four and five miles an hour until he came down on the planking and then the horses were in a walk.

Q. Did you see him from the time that he came on the platform until the collision?

A. Yes, sir.

Q. At what rate of speed did his horses travel across that platform or planking?

A. They walked until they came on this track and then he slapped them with the lines and they jumped across the track; sprang

184 off pretty lively when he hit them.

Q. Did you see the collision?

A. Yes, sir.

Q. Relate to the jury how it occurred.

A. His horses sprang across the track and most of the buggy got across except the hind wheels, and as the hind wheels was crossing the caboose struck it and knocked Mr. Holmes up a couple of feet, I should think, from the buggy, and his head went down on the ground.

Q. Did you notice how far west the train passed at the time of the collision?

A. I did not.

Q. At the time this train was approaching west state whether or not you saw any person on the west end of the train.

A. On the train that was backing up?

Q. Yes, sir.

A. There was none, I do not think.

Q. You think there was none?

A. No, sir.

Q. Did you observe any one at the switch about the crossing?

A. Yes, sir.

Q. Do you know who it was?

A. No, sir.

Q. What was he doing there?

A. He had turned the switch and was motioning his hand that way (indicating) to back up, I thought.

He had turned the switch and was beckoning his hand that way.

Q. Which way was he looking?

A. He was looking east.

185 Q. Did you notice whether he looked north any?

A. He was looking at the train at the time.

Q. Do you know what the custom of the defendant was at and before that time with reference to the ringing of the bell at railroad crossings at Sprague?

A. I worked at Sprague yards some myself and have seen engines moving without ringing the bell sometimes, and a good many times when they were ringing the bell.

Q. Do you know what the custom was?

A. General custom, they ring the bell.

Q. Is your hearing ordinarily good, or was it at that time?

A. Yes, very good.

Q. Were you in a position that if the bell of the locomotive on this train had been rung on this day that you would have heard it?

A. If I had been listening, probably I could, but I did not pay any particular attention to that. There was another wagon behind me, and my wagon was making a noise and the cars running, and I did not pay any attention. I could not say whether it was rung or not.

Q. You have no knowledge as to whether the bell was rung?

A. No, sir.

Q. Did you notice how far from the track it was that Mr. Holmes fell?

A. I should think that it was about eight to ten feet.

Q. You say something, Mr. Fish, with reference to obstructions. Did you notice how the height of the box cars] that were standing on the side track——

A. My recollection is, if it serves me right, that there was a good many box cars.

Q. State whether or not a person could see over the top of that box car an approaching train on the switch as it did approach there.

A. From where I met Holmes?

Q. Yes, sir.

186 A. Could not.

Q. Were you in a position that if any warning had been given Holmes of the approach of that train you could have seen it?

A. I did not see any warning given at all. I could see on the lower part and down towards where the new depot is now, but I could not see back on account of those cars.

Q. You could have seen wherever Holmes could have seen, could you not?

A. I think I could when I met him first.

Cross-examination.

By Mr. McNaught:

Q. What kind of a team were you driving?

A. Driving a span of mares eight years old.

Q. Was it a two-horse team or four?

A. Two-horse team.

Q. Not a four-horse team?

A. No, sir.

Q. How far were you standing from the crossing as the train was going to the east?

A. About thirty feet.

Q. And as soon as the train had passed up going to the east you started to cross, or soon after?

A. Yes, sir.

Q. Where were you when you saw the person at the switch making the motions that you gave?

A. That was after I had passed Holmes and was looking around watching Holmes as he was going across.

Q. Did you know what those motions were?

A. No, sir; I did not.

187 Q. Give the motion again.

(Witness here gave motion as before.)

Q. Now, is not that the motion to back up?

A. I could not say. I am not familiar.

Q. And that was given when Mr. Holmes was just driving onto the planking?

A. No, sir; that was given after he had passed me and was on the planking—past me, going across the track.

Q. Well, this man that gave that motion and sign was standing at that switch at that time?

A. Yes, sir.

Q. How far from him at the time the motion was made was Mr. Holmes?

A. I could not say exactly. I should think forty to fifty feet.

Q. Did you say anything to Holmes as you went by him?

A. Yes, sir.

Q. What did you say to him?

A. I said, "Look out, or those cars will catch you."

Q. What did he say in reply to that?

A. Didn't say nothing.

Q. How far were you from him when you gave him that warning?

A. He was just going past me, probably ten or twelve feet.

Redirect examination.

By Mr. ANDREWS:

Q. How loud did you speak to Mr. Holmes when you told him to look out, or the cars would catch him?

A. Well, I spoke about this way, "Look out, or those cars will get you;" probably might have been louder.

188 Q. What motion did he make?

A. He did not seem to hear me. He did not look up.

Q. What is your judgment as to whether or not he did hear you?

A. I don't think that he heard me. He did not pay any attention. He did not look up.

Q. You say he did not look up?

A. He did not pay any attention to me at all. He was just looking straight ahead.

Q. At the time you spoke to him state whether or not your wagon was on the planking.

A. It was; yes, sir; just going down off the planking.

Q. What kind of a wagon were you in?

A. Two-horse wagon.

Q. Was it a dead-axe wagon?

A. No, sir.

Q. Spring wagon?

A. Yes; it was a dead-axe wagon. I had it heavily loaded. My team was going slow.

Q. Now, what place were you in, Mr. Fish? Just point on the chart where you were at the time that Holmes got onto the crossing and the collision occurred.

MCNAUGHT: That is not new matter.

ANDREWS: I do not insist on it.

ANDREWS: That is all.

Court adjourned until tomorrow at 9 a. m.

189 SATURDAY, *November* 7, 1885.

Court met pursuant to adjournment.

JOHN D. SLATER, a witness on behalf of the plaintiff, being duly sworn, testified as follows:

(By Mr. ANDREWS:)

Q. State your name.

—. J. D. Slater.

Q. Where were you on or about the first of November, 1883?

A. I was in Sprague.

Q. Did you witness a collision between the plaintiff, James Holmes, and a car of the Northern Pacific Railroad Company?

A. No, sir.

Q. You were there at the time of the collision?

A. I was there at the time of the collision.

Q. Where were you?

A. I was in the warehouse. At the time of the collision I was in a car on the side track.

Q. Look at that plat, Mr. Slater. Do you recognize the whereabouts of the warehouse on that plat?

A. Yes; there is the warehouse (indicating same on plat).

Q. Do you know the position of the freight cars on the side track at the time of the collision?

A. Yes; I know about the position they were in.

Q. State to the jury the position of the cars there.

A. There were three cars on this track by the side of the warehouse of this, by the side platform. This diagram represents the cars, and this lower car, the western car, was projected about a third of the way over that platform. About a third of that car projected over that planking, and the other three cars were right against it
and above it. At the time the collision occurred I was in this
190 middle car, and this middle car was just a little below the
middle door of the warehouse when the train came down this
side track, I believe (indicating the track).

Q. Mr. Slater, point to the place where the door of the middle car stood at the time of the collision, on the plat.

A. Which door—do you mean the door of the car?

Q. The door on this side of the car.

A. In relation to the door of the warehouse?

Q. Yes, sir.

A. It was about 10 or 12 feet west of the middle door of the warehouse, the door of the car was.

Q. Have you any particular fact on your mind that impresses that on your memory, Mr. Slater?

A. Nothing very particular, only I had to go down through there, and I had to go back around the door to unload the freight into the warehouse.

Q. Point out to the jury the cars you took from unloading the freight from the car into the warehouse—that is, over the platform.

A. Well, I carried the freight from this car onto the platform and around through this door and on this side of the door here where we delivered it to the truckmen, and I hauled the freight clear across the warehouse.

Q. Now, how far west of that door, Mr. Slater, was the middle of the middle car?

A. The center of the middle car?

Q. Yes, sir.

A. The door of the middle car was about ten to twelve feet west.

Q. State whether or not you were the freightman there or freight agent.

A. I was the warehouseman.

191 Q State whether or not any freight was being put into or discharged from the car on the west end of the track at the time of the collision.

A. There was none at that time.

Q. How long had that car been standing there at that time?

A. It had been standing there probably about five minutes—probably less.

Q. Now, you say at the time of the collision you came through the middle car and was standing in the door on the south side of the car?

A. No; I did not say that.

Q. Say what you did say or state the fact.

A. At the time of the collision I was in this car or going out of it into the warehouse. I was in the car at the time the train going west stopped.

Q. You were in the car at the time the train going west stopped?

A. Yes, sir.

Q. Now, did you notice the train going west?

A. Yes, sir.

Q. Did you notice the locomotive?

A. Yes; I noticed the locomotive.

Q. Was your attention particularly called to whether or not the bell was ringing?

A. Yes; my attention was called to that.

Q. State to the jury whether or not the bell was ringing.

A. The bell was not when I saw the train.

Q. Now what distance did you see the train while it was backing down there—that is, the locomotive?

A. Well, it was probably—it might have been a hundred feet up here somewhere—something like that distance up the track.

192 Q. During that time what was the condition of the bell or what was the state of the bell with reference to its being rung?

A. The bell was not ringing when I looked out to see the train.

Q. And when you first looked out where was the train—this is, where was the west end of it?

A. I do not exactly know where the west end of it—of the train—was. The engine was up here somewhere—something more than a hundred feet to the engine. It was on this side track, I believe (indicating).

Q. Did you see the locomotive at the time of the collision?

A. Well, I saw it when it stopped. I don't know anything about the collision.

Q. You did not see that?

A. No.

Q. State what your recollection is with reference to the bell having been rung at the time the locomotive stopped and just prior thereto.

A. When it stopped it rang, I believe.

Q. Just when?

A. When it stopped.

Q. Just the moment it stopped?

A. Yes, sir.

Q. Do you know anything about the grade of that road at that place—the railroad?

A. Well, I don't know. I don't know the grade exactly. I don't know what the grade is.

Q. Can you state whether or not cars will start if the brake is unloosed?

A. Yes; I have started them by throwing the brake off.

193 Q. Which way do they move?

A. They move west. The grade is west. That is, by throwing a brake off a car it will move itself; it will start.

Q. Mr. Slater, have you any recollection as to whether or not air brakes were in use on the locomotives at that time in Sprague yard?

A. Yes; there was air on all the engines.

Q. That is your recollection, is it?

A. Yes, sir.

Q. Have you any particular reason for knowing it, Mr. Slater?

A. Yes; I helped put the air on the engines for awhile in the shops. The yard engine had air on it.

Q. Now, say if this helping put the air on was before the accident?

A. Yes; it was nearly a year before the accident.

Q. Did you see Mr. Holmes almost immediately before the accident?

A. I saw him before I went into the car, I believe.

Q. Where was he when you saw him?

A. He was on this planking—platform; he was driving up on the main track, driving across the track from this side. He was in a buggy by himself.

Q. Did you notice at what rate of speed his horses were traveling?

A. He came up there pretty fast, and I think he stopped or checked up there on the planking or platform.

Q. Did you notice after he checked up at what rate of speed his horses moved at?

A. They were going very slow, I believe, though I do not remember just exactly the rate of speed they were going.

Q. What caused you, Mr. Slater, to go through the car as you did to look to see if the bell was ringing?

A. Well, I just had had those cars put in there on this side track, and they were switching up here and I was afraid they 194 would throw some more cars down here and throw these cars that I had already there over the crossing, and I heard the bell ring up here at the end of the switch and I did not hear it ring any more, and I heard the cars rumbling on the track and I looked to see if they were backing back on the track here; if they were I wanted to be prepared.

Q. How long did you hear the bell ring?

A. Oh, it rang two or three strokes; three or four.

Q. And where was the train when you heard it?

A. It was up at the end of this switch here. The general offices are right there somewhere, and the ends of the switches are about opposite the offices, and there is where the bell rang.

Q. Now, did you hear it ring any more from the time you heard it ring these two or three taps until the time of the collision?

A. No; I did not hear it ring any more. That is the reason I looked out, because I did not hear it ring.

Q. I understood you to say, Mr. Slater, *to say* that you did see the bell of the locomotive.

A. I did not say that I saw the bell of the locomotive, but I did see it when I looked out.

Q. Now state to the jury whether or not it was ringing.

A. At the time I saw the bell it was not ringing when I looked out here.

Q. Did you notice whether there was anybody on the end of the train, west end of the train, as it was moving west?

A. No; I did not notice the train particularly. I did not notice anything only the engine, that was all. I did not notice the train. I noticed the engine.

195 Cross-examination.

(By McNaught:)

Q. You say you did not see the collision?

A. I did not see the collision.

Q. But you do not know that there was any collision at all?

A. I don't know only from hearsay—from circumstances.

Q. You had control of the handing of the freight from these box cars in through the freight depot and then delivering it to whom the freight belonged?

A. Yes, sir.

Q. And you had these three cars placed in that position at that time?

A. About that position. They were a little further down than they are marked, I believe.

Q. A little further down this way (indicating)?

A. Yes, sir.

Q. And is this mark on this diagram for the middle of the freight depot about the right location of the middle doors?

A. Yes; the middle door is a little further down than that—than half way from this end.

Q. How far is it now from that middle door to the west end of the freight building?

A. Well, I think it is about 30 feet.

Q. What is the width of the planking or porch on the south end of the freight building?

A. It is about eight feet, I think.

Q. What is the distance between that planking and the planking on the crossing (indicating the incline)?

A. Well, I don't know, but I think it is about 14 feet. I do not know the distance on this incline; that is an incline there.

196 Q. You had these three box cars placed in there for the purpose of taking the freight out, I understand?

A. Yes, sir.

Q. That is the usual and customary place?

A. That is what they were put in there for, for loading and unloading and no other purpose.

Q. That is what that freight building is there for, for the receiving and handling of freight in the ordinary course of the company's business?

A. Yes, sir.

Q. You stated, Mr. Slater, that you heard the bell when it was away up here some place about the round-house or shops?

A. In front of these shops; the offices are not marked on this map, but they are somewhere in this neighborhood.

Q. How far is that up—that is, up from the freight depot; how far is it up?

A. The offices?

Q. Yes.

A. They must be five hundred feet; four or five hundred feet.

Q. You stated that you heard the rumbling noise of the train as it was approaching. What distance at that time and on that day could you hear that rumbling noise?

A. Well, it is owing to the confusion around there that there might have been. I suppose in an ordinary case you could hear that rumbling four or five hundred feet up the track, but that day I suppose that I could have heard it three or four hundred feet.

Q. Did you say that you saw the engine when it stopped?

A. Yes, sir.

Q. Where did the engine stop?

197 A. It stopped about opposite the car where I was unloading my freight.

Q. And it stopped about opposite this middle car?

A. Yes; about opposite the middle car.

Q. You say you saw Mr. Holmes just as you came out of the car coming up onto the platform or planking there.

A. Yes; as I came out of the warehouse, going into the car, I saw Holmes coming on this planking or platform—that is, the ground platform. This is the planking and crossing on the railroad track. He was driving up as I went into the car from the warehouse.

Q. And driving at first at a pretty good trot?

A. Well, he came up, and when I saw him he was going in a very fast walk; coming on the platform, I think, he checked up and stopped. He checked up anyway, but I did not notice him particularly. I merely noticed that it was Mr. Holmes in a buggy.

Q. Then you paid no further attention to him?

A. I paid no further attention to him.

Q. You went on about your work?

A. Yes, sir.

Q. You said there was some grade there at that place. Do you know how many feet it is to the mile?

A. No; I am not prepared to say what the grade would be there or what it is. It is quite a little grade there.

Q. Do you know, Mr. Slater, at that time whether the engine they were using was the regular switch-engine? Was it not a different engine they were using that morning?

A. I think it was the switch-engine.

Q. You are not certain?

A. It is my impression that it was the switch-engine.

198 Q. Do you know whether or not they were using air that morning? Do you know whether or not there was something the matter with the engine and they were not using air?

A. There might have been something the matter, for all I know.

Q. There was air on the engine?

A. The apparatus was on the engine.

Q. The apparatus for using air? You do not know, of course, whether it was on all the engines or not; it had been put on before?

A. It had been put on the switch-engine. It was put on all of the engines that were turned out on the road for regular service.

Q. You don't know whether there was air on this engine at that time or not?

A. No; I am not positive about it.

Redirect examination.

(By ANDREWS:)

Q. Do you know whether the locomotive stopped right where you were or whether it went below you?

MCNAUGHT: He has answered that.

A. The front part of the engine stopped right opposite the car—that is, the engine stopped before it got clear past me.

Q. Well, state to the jury whether or not the front part of the engine was standing just even with you where you were.

A. Well, the front part of the smokestack of the engine—you see the engine was going down backwards and the cars they were attached to the engine—were attached to the hind part of the tender and the engine was going west and the smokestack was east, on the east end of the engine.

Q. What is the length of a locomotive and tender, Mr. Slater, do you know?

199 A. I should suppose, to the best of my knowledge, I should judge about forty feet.

Q. That is a mere matter of conjecture?

A. I suppose, probably, an engine is longer than 40 feet and the tender.

A. Rickett, a witness on behalf of the plaintiff, after being duly sworn, testified as follows:

(By Mr. Andrews:)

Q. Where were you on or about the first of November, 1883?

A. I was in the town of Sprague.

Q. Do you know James Holmes?

A. Yes, sir.

Q. Did you witness a collision between him and the defendant, The Northern Pacific Railroad Company, on that day or about that time?

A. Yes, sir.

Q. Relate the circumstances, Mr. Rickett, as you remember them.

A. Well, I was standing in front of my place of business at that time and I saw the train passing west, and after the train passed up I noticed two teams on the south side of the crossing, and when the train passed up these teams started to cross the track to the north, and the train passed up a little west of where I was standing, perhaps, and reversed and moved back west, and I noticed that the teams that had started across to the north were not liable to make very good clearance, which attracted my attention. and just about the time that these teams were on or across the track, perhaps, or pretty near across, I seen Mr. Holmes coming from the opposite direction crossing to the south, and just about the time
200 that—well, he was pretty well to the west of that crossing, too—but anyway as the train passed down it collided with Holmes' buggy and the collision threw him out of the buggy.

Q. When he was thrown out of the buggy how far was he thrown?

A. Well, he was thrown at least two or three feet off the buggy and then was pushed off, but I should think eight to ten feet—perhaps eight feet. I think it must have been that far from where the buggy was struck—possibly further. I could not say positively just how far, but he was thrown on the ground some distance from where the train struck the buggy.

Q. Did you notice in what position he hit the ground?

A. No, sir; I could not tell exactly the position he hit the ground. I know the position he was in when I got to him.

Q. State it.

A. He was laying on his side, his face was kind of under him like. I did not walk; I ran up to him. I had to go some forty feet—sixty to eighty feet, perhaps—from where I stood to where I found him; and I took hold of the man and turned him over and he showed some signs of life, and I remarked to the crowd—there were some 10 to 15 men there, I should think, at least—and I remarked to the crowd to help me carry the man in, that he was not dead, and a young man there by the name of Campbell took hold with me and we carried him into my house.

Q. Did you see any wounds on Mr. Holmes?

A. I think there was some slight wounds, nothing very——

Q. Did you notice the wounds about his head?

A. Yes; he was wounded some in the head, bled some.

Q. What was that wound on his head?

201 A. Well, it was a cut, it looked as though through the skin or even deeper; he bled some, considerably.

Q. Recollect what the physician said at that time with reference to there being a fracture of the skull?

A. I think that Mr. Olds told me, as a matter of course, when I inquired about him, he had dressed the man's wounds. I inquired what he thought——

McNaught: We object to what he inquired.

Andrews: The question I asked the witness was whether or not the physician at the time of making the examination said anything with reference to the fracture of the skull.

McNaught: We object. I do not think it is competent.

Q. Did you notice how far west the train moved after the collision?

A. No, sir; I could not say positively; it must have been further west than the man was thrown; when I got there there was no train right opposite, but I could not state how far it went west.

Q. I will ask you if the train moved so far west as to clear the crossing?

A. I am inclined to think it did; it must have cleared the crossing, although my attention was not attracted or called to the condition of the train, because I paid more attention to the injured man; to the best of my judgment, the train had passed further than I was—further than the man was thrown.

Q. Do you know who it was that was going over the crossing from the south towards the north just before the collision?

A. Well, sir, at the time I don't think I noticed who they were. I ascertained afterwards; at the time I don't think I knew both the gentlemen. I don't remember as I really recognized them at the time.

202 Q. Well, how soon after both of these men were off the track on which the collision occurred was it that Holmes came on the track?

A. Well, I think Holmes' horses were on the track very nearly or actually as soon or before the hind team cleared the track; they were very close together, anyway, because I thought there was danger; I noticed that. I thought these teams crosssing—I thought it very singular that they would reverse and come back down on them.

McNaught: We object to that.

Court: That is ruled out.

Q. Did you notice any person on the back end of the train going west?

A. No, sir.

Q. Do you know what the custom was in Sprague yard with reference to the ringing of the locomotive bell that was moving the train at the time of approaching the crossing?

A. I think the custom was generally the bell was rung.

Q. You say it was the custom to ring the bell?

A. Yes; I think it was the custom for the bell to be ringing.

Q. How was your hearing, ordinarily good?

A. Yes; I think my hearing is ordinarily good.

Q. Point to the jury about the place where you stood at the time of the collision.

A. I don't know that I can get at it exactly on the map. I suppose that is the post office; if that is the post office that is my place right here. I was just about in front of it.

Q. Could you then have heard the bell of the locomotive prior to the time of the collision?

A. Yes; I could have heard it if it was ringing. I was not over ninety feet from it.

203 Q. Did you or did you not hear it?

A. No, sir; I did not observe it. If I heard it I did not observe it. I did not notice it.

Q. What is your best impression at this time as to whether or not the bell was ringing?

McNaught: We object to that. That is what the witness said before, and he is undoubtedly correct in it.

Andrews: He may not use the word observe in exactly the same sense that counsel does. However, I will not insist on the question.

Q. Were you in a position, Mr. Rickett, in which you could have seen any warning that might have been given by the employés of the defendant of the train approaching the crossing?

A. Yes; I could have seen any signals if I had been looking for anything of the kind.

Q. In what direction were you looking?

A. I was looking right in the direction of the crossing and the train and teams crossing. My attention was entirely directed to that point.

Q. To the crossing?

A. Yes, sir.

Q. If, then, any signals had been given at the crossing or in the immediate vicinity of the crossing would you have seen them?

A. If I had been looking, if my thought had been attracted to it, I was in a position to see, but I did notice any. I was not looking. I did not notice any. I do not remember. The train moved up and passed down very quick. I saw the train and thought that there was danger. As a matter of course, that attracted my attention. I did not look for signals or anything else.

204 Q. Did you notice how long, after the train passed east, before the motion was reversed and started back again?

A. It was reversed very quick; moved back very quick. These teams started just as soon as the track was clear, and they had scarcely time to clear the track. I noticed particularly, because I thought that there was going to be a collision.

Q. Were you present at the time that Dr. Olds came to treat the plaintiff?

A. Yes; I was present.

Q. Did you notice whether or not any stimulant was administered by the doctor to the plaintiff?

A. Yes; he, the doctor, told me to bring him a little brandy.

Q. How long after the accident was that?

A. Oh, it was a very short time; he just came in and examined him.

Q. Did you notice whether or not the doctor smelled the plaintiff's breath at the time he was called?

A. No, sir; I did not notice that he did. I did not pay any attention to any such thing.

205 Cross-examination.

(By Mr. McNaught:)

Q. — you state, Mr. Rickett, how far the train went east after it passed the crossing?

A. Well, the switch that they reversed on is a little above where I was standing, perhaps it might be 30 to 60 feet; it just went above the switch sufficient to clear and then reversed.

Q. Now, will you point out on the diagram just where the train reversed and started back?

A. I will, as near as I can.

Q. Here is one switch here and here is another one there; there is the second switch——

A. That is the switch that they reversed on.

Q. That would be the first switch, then, east of the crossing?

A. Yes; I know it reversed about that distance above me.

Q. You know how far it is from the crossing to the first switch?

A. Well, my judgment is that it is not much more than a hundred feet; perhaps more; I don't know that. I can't measure the distance exactly, but it is not very far.

Q. About a hundred feet?

A. I think it is about a hundred; perhaps a little more. I cannot say exactly, because I never had my attention called particularly to the distance.

Q. Now, you say, Mr. Rickett, that when you went to pick up Mr. Holmes *up* that you did not notice just where the train was.

A. No, sir; I did not exactly; in fact, I did not notice where the train was at all. I did not notice the train while I was there before I moved away. I could not tell exactly where it was.

Q. So you do not pretend to state where the train stopped?

206 A. No, sir; I could not tell where it stopped, because I really did not notice it. If I noticed it I did not charge my mind with it. I seen it stop.

Redirect examination.

(By Mr. Andrews:)

Q. What is the name, Mr. Rickett, given by railroad men, if you know, to that part of the track which is used for the purpose of moving a switch over from one track to the other?

A. I don't believe I know. I know it is a switch, and if there is any names to the part of the rail that slides——

Q. You don't know which way on the track it runs, do you?

A. Well, sir, I have seen a switch a thousand times.

Q. You cannot say?

A. No, sir; I would not be positive which way the switch works. The lever is on the south side of the track. I have crossed it so often that I could not remember half the number of times.

207 James Holmes, plaintiff, being duly sworn, testified in his own behalf as follows:

(By Mr. Andrews:)

Q. You may say to the jury whether or not you were under the influence of liquor at the time this collision occurred.

McNaught: That is not new matter.

Andrews: I submit that it is within the discretion of the court to allow us to close our case in as good condition as we can.

The Court: I permit the question at this time.

McNaught: I think that we will object to that question as put to the witness "whether he was under the influence." There are different degrees of influence.

Andrews: We will not quarrel about that.

Q. What was your condition at the time with reference to being sober or drunk or intoxicated?

McNaught: Now, there are many degrees of sobriety and intoxication.

Q. Repeat your condition as near as you can.

McNaught: I think the better way would be to find out what he had been drinking.

The Court: One man might be able to drink more than another. They might prove the fact that he was so accustomed to drinking that a little would not affect him.

Andrews: We propose to prove that he was not affected at this time.

McNaught: That is a matter that I do not think the witness ought to be allowed to testify concerning.

The COURT: I think a person who has drank whisky can tell what effect it has had upon him.

208 WITNESS: I was not drunk; I had my faculties; I understood what I was doing as well as I do now, and I have not tasted liquor since some time last March, of any kind. I had drank five or six times that day, but never had——

McNAUGHT: I think the witness has gone far enough.

The COURT: He can explain his condition fully. Go on, Mr. Holmes.

A. There is no man ever saw me drunk in Sprague or the worse for liquor.

Q. How was the atmosphere on that day as to being warm or chilly?

A. It was a chilly day; cold. It was a clear day.

Q. Well, now, had you been in the house that day or out-doors?

A. I had been in no house from the time that I left Sprague in the morning until I was carried into the house after the injury; had been in no house but a house on the ranch, and Mr. White and I walked over a quarter of a section of land pretty thoroughly, there, and I had rode, going and coming that day, 28 miles, and it will take more than half a dozen drinks of whisky to affect a man that does work.

Q. How much liquor had you drunk on that day before the accident?

A. Well, I could not tell how much; I took a small flask. It was not exactly an overcoat—kind of business coat—and took a small flask in the inside pocket and I did not drink it all. There was, perhaps, an inch of it in the bottom when I left. I did not drink when I was coming for probably ten or twelve miles. I had treated several out there, and I know that Mr. White had asked me to drink once or twice before I got in and I told him I had enough and did not want any more.

Q. Mr. Holmes, do you know Dr. W. H. Olds?

A. Yes, sir.

209 Q. Do you know where he is at present?

A. He is in San Francisco, doctoring for his eyes.

McNAUGHT: He testified to that before.

ANDREWS: We desire to show that he is out of the city and wish to introduce the evidence of the Doctor taken at the last trial by Mr. Bowman. We think the authorities sustain the proposition that the testimony taken at a former trial may be introduced if the witness is out of the State.

The COURT: You had better show it now.

The COURT: I will not rule on the question now. I will let him lay the foundation for offering it.

ANDREWS: I will bring what authority we have and submit it.

Q. Do you know whether or not Dr. Olds at the present time is in the Territory of Washington?

A. Dr. Olds is in San Francisco. I have a letter from him in my pocket, and he says——

McNaught: We object to what he says in the letter.

Q. Have you the letter with you?
A. Yes, sir
Q. Produce it.

(The witness here produced a letter.)

Q. Do you know the handwriting of Dr. Olds?
A. Well, I could not swear to his handwriting.
Q. Do you know his signature?
A. I have had correspondence with him before. I would not attempt to swear to that. I think it is his, though.
Q. You say you think it is his signature?
A. I do; yes, sir.

(Andrews:)

Q. I propose to offer this letter to the court. I will ask you if you had any conversation with Dr. Olds before he went away as to his returning here in time to testify in this case.

210 McNaught: We object.
The Court: Objection overruled.
McNaught: We except.

A. He told me that he would be back in time—by the first of this month he would be back here.
Q. I will ask you if that letter was received in this envelope.

A. That was the envelope that it was received in.
Andrews: We offer the envelope and letter in evidence to the court.
McNaught: Offering it for the information of the court.
The Court: Offered to the court for the purpose of laying a predicate for the admission of what the Doctor swore to at the former trial. The court will receive it and consider it for that purpose.

Cross-examination.

(By Mr. McNaught:)

Q. You state that you had taken six drinks that day?
A. Five or six.
Q. And that there was a little whisky left in the flask?
A. There was whisky left in the flask.
Q. Full when you started in the morning?
A. Yes; I think it was.
Q. How many drinks did you take that morning before you started?
A. Oh, I don't know. I might have taken one or two; not more than two. I might have taken one, I think quite likely. I would not swear I took any, but I think I did.
Q. Did not Mr. White have a flask of whisky with him also that day?
A. Yes, sir.
Q. How much was there left in that when you got back home?

A. I don't know. I did not carry his.

211 Q. How many drinks did you take out of his flask?

A. Well, I can't say that I took any out of his flask.

Q. Don't remember?

A. I would not say that I did.

Q. How many did you take out of your own?

A. I have stated five or six during the course of the day, but I won't say that I took them all out of mine or his.

Q. Don't remember?

A. I would not say how it was.

Q. A little irregular in your drinking that day, were not you?

A. What do you mean by irregular?

Q. Well, you took your drinks at odd times—whenever you felt like it.

A. We did not have any stated time. We did not take it by the watch—any time when we felt like it.

Q. Kind of a cold, chilly day, was it not?

A. It was a cool day.

Q. What did you take your liquor along for?

A. Well, I don't hardly know how to answer that.

Q. Did you not take it along to drink?

A. Took it along to drink and to treat our friends.

Q. Took it along, too, because it was a kind of a chilly day—to brace yourselves up?

A. We would have taken it along any other day. If I was going in the country now I would take some along to treat my friends.

Q. That was whisky?

A. It was whisky, and good whisky, too.

Q. What time did you leave town that day?

A. Might have been seven or eight o'clock—somewhere along there.

Q. Was not it about half past nine?

A. Don't think it was.

Q. Think it was early as eight o'clock?

A. Yes, sir.

212 TH. SMITH, a witness on behalf of the plaintiff, being duly sworn, testified as follows:

(By Mr. JONES:)

Q. Where do you reside?

A. Sprague.

Q. Where did you reside on the first of November, 1883?

A. Sprague.

Q. Do you know the plaintiff—Mr. Holmes?

A. Yes, sir.

Q. Were you in Sprague on the first day of November, 1883, about that time?

A. I was there the first of November. I don't know whether I was in town the first day.

Q. Did you see the collision between Holmes' buggy and a train on B street in the city of Sprague about that time?

A. Yes, sir; I saw a part of it.

Q. Where were you standing at the time of this collision?

A. I was standing on the street between Maloney's stable and Dolan's saloon.

Q. There is a diagram of the city of Sprague, the railroad, and B street. Step to that diagram and show the jury whereabouts you stood.

A. There is the stable (indicating) and there is a vacant lot between the stable and Dolan's saloon. If I understand the diagram, and of course I do, I believe that is Dolan's saloon. Well, somewhere between the corner of this stable and Dolan's saloon—somewhere along the front—just a little ways from that vacant lot.

Q. About how far were you standing from the place where the railroad track crosses B street?

A. It is the full length of that block, with the exception of about a lot and a half. It is pretty near the full length of that block.

213 Q. Could you tell the jury what you first saw in reference to this collision and the injury that Mr. Holmes sustained? You may tell the jury just what you saw there.

A. Well, I was talking with a party there and was not noticing anything very much until my attention was called to some trouble below and I looked up and the buggy had been struck, and I don't know but that the car might have been against it, yet it was just coming over from the car, and the horses started to run, and in an instant Mr. Holmes was thrown from the buggy on the street and the team and buggy went on.

Q. How far did this shock or collision throw Mr. Holmes from his buggy?

A. I could not say how far it did throw him; it threw him out. He fell on the ground. I do not remember how far he fell.

Q. Were you in a position, Mr. Smith, where you could have heard the ringing of the bell if there had been any ringing on the train at that time?

A. Yes; I could have heard it.

Q. You may state whether or not the bell was rung.

A. That I don't know, whether the bell rang or not.

Q. Did you hear it ring?

A. I could have heard it if I had been paying any attention, but if the bell rang I did not hear it. At least it did not attract my attention. I did not notice the bell ringing.

Q. Did the circumstances at the time produce on your mind an impression concerning the ringing of the bell?

McNaught: I object to that question.

The Court: That raises the question as to whether he can testify as to an impression. I have no book to determine the question, but I am under the impression that he may, but I will hear counsel if you wish to be heard on it.

214 (Argument by counsel.)

The COURT: I think the question propounded by Mr. Jones would lead to an answer drawn from inference based upon all the circumstances occurring there. I think the witness may speak as to his impression, but it must be an impression in his mind as to what actually occurred. It cannot be inference drawn from circumstances. If he has an impression whether the bell did ring or no, he may state it.

MCNAUGHT: We except.

Q. You may state, Mr. Smith.
A. What is that question?
Q. What is your impression now as to whether or not that bell was rung at that time?

MCNAUGHT: We object.
The COURT: If you have any drawn from any distinct impression now as to whether there was a bell rung, you may state it.
MCNAUGHT: We except to the ruling.
The COURT: The exception is allowed.

A. Well, if I am allowed to answer as to my impressions I can answer the question. My impression is that the bell was not ringing.

MCNAUGHT: We move to strike out the answer.
The COURT: I will overrule the motion.
MCNAUGHT: We will save an exception.

215 Cross-examination.

(By Mr. MCNAUGHT:)

Q. You stated, Mr. Smith, that your attention was not drawn to this train; that you were talking with some gentlemen; knew nothing of the circumstances until just at the time of the collision?
A. Yes, sir.
Q. Who were you talking with? Do you remember?
A. I do not; some men that had a team hitched up at the stable—livery stable. I was talking with him. I do not know who it was.
Q. You stated also that you did not know whether the bell was ringing or not.

ANDREWS: We object.
The COURT: Objection overruled.

Q. You said that you did not know whether the bell was rung or not as the train approached?
A. Yes, sir.
Q. And you were not giving any attention to the train prior to the time of the collision?
A. No; I was not.

The COURT: I will grant Mr. McNaught's motion to strike out the answer of the witness on the point with reference to the ringing of the bell.

216 Dr. B. F. BURTON, a witness on behalf of the plaintiff, being duly sworn, on oath testified as follows:

(By Mr. ANDREWS:)

Q. Where do you reside?
A. In Sprague.
Q. How long have you resided there?
A. Been there nearly four years.
Q. What is your business?
A. Physician and surgeon.
Q. How long have you been a physician and surgeon?
A. Practicing between seven and eight years.
Q. Do you know James Holmes?
A. I do.
Q. Have you ever had occesion to examine his injuries?
A. I have.
Q. What has been the result of your examination, Doctor?
A. The first time that I examined Holmes I think it was three or four weeks after the accident.
Q. Now relate to the jury fully his physical condition at that time.
A. His condition at that time—he was suffering then very extensively, more in particular with his back and from a wound on his head. The wound was very slow in healing, and, too, if I remember right, the wound was just about on top of his head—about that position (indicating)—and it was to the bone and laid open, and I examined it with a probe to the bone and found that the bone had become *ac*crossed or diseased, and we accounted for the slowness of the healing of the bone. At the time I examined him I could not tell whether there had been a fracture, but I was under the impression not. He was suffering then also from concussion of the spine.
217 Q. Explain to the jury what concussion of the spine is.
A. Concussion of the spine is a sudden jar. The spine—the spine is suspended right in a fluid that is continued within the spinal column. It is within the backbone. There is a channel that runs through the backbone, and this cord is suspended in this fluid, and it takes a sudden jar or force to produce concussion or sets up inflammation from the sudden jar.
Q. Doctor, would the falling of a person on his head and shoulder out of a buggy four or five feet high cause such a jar?
A. Yes; it is liable to cause such a jar. If the cord had been in connection with the brain it would be material where he struck. He might receive concussion of the spine by striking on his buttocks or head either; sometimes a very trivial thing will produce concussion of the spine.

Q. What is your impression, Doctor, with reference to there being a well-defined case of concussion of the spine?

A. At that time it was, and at the present time he shows it in his present condition—and from that time on. I feel confident in my own mind that it was concussion of the spine from that fall. Even the result of concussion of the spine does not immediately follow the accident—that is, within a few days. It may not follow and you may not notice there is any decided concussion of the spine for one, two, or three weeks afterwards, and at the time. Of course I only know what Dr. Olds told me in regard to his condition first.

Q. What information you have received from Dr. Olds you need not repeat.

A. I was going to say his condition when Olds first saw him.

218 Q. State whether it is a characteristic of concussion of the spine to be progressive in its nature.

A. Yes; it is. Sometime, concussion will subside in a few weeks. Other times it will last for years, and times it will become permanent and concussion might produce—whenever we have inflam-ation there is a kind of plastic formation thrown out which will produce thickening of the cord. This thickening is liable to produce pressure. Whenever we get pressure we are liable to have paralysis of some part of the body, and particularly of the spine and the parts that are supplied with these nerves.

Q. Whenever paralysis is in the course of resulting from an injury state what the symptoms are so far as the patient is concerned.

A. When paralysis results from such injury the symptoms, so far as the patient is concerned—the symptoms of concussion would be pain—pain or pressure—would be probably loss of motion or loss of sensation if the thickening is very extensive. At other times he would suffer with pain in just the immediate region of the spine itself, wherever the concussion was greatest.

Q. What would a prickling sensation be, Doctor, in the feet and limbs and arm?

A. They might be due to pressure.

A. And pressure resulting from what?

A. Might be the result of displacement of the spinal column itself or might result from the thickening of the cord itself or hemorrhage within the cord.

Q. Would it result from such diseases as the plaintiff has, as you have decided?

A. Yes, sir.

Q. When this disease is progressive how long does it continue?

219 A. Liable to continue a good many years; liable to be a permanent thing.

Q. What is the final result of it?

A. Well, it will result at times in death; other times it will result in paralysis of certain parts of the body and the patient will become emaciated and run down in general health.

Q. Have you made an examination of Mr. Holmes recently?

A. I have. The last examination I made of him was about two months ago.

Q. What *is* his condition at that time in comparison with the examination you first made of him?

A. Well, his condition was altogether different.

Q. Was it worse or better?

A. It was worse. The first examination I made of Mr. Holmes you might say included the stage in the beginning or the first month. The last examination I made of Holmes I found that over certain parts of the spine there was tenderness. I also found his left shoulder—I think it is—I am not positive of that whether right or left. I found the joints stiffened. The stiffness of that joint may have been due to direct injuries to the joint, as I testified here six months ago; that in my opinion it was paralysis due from paralysis of a certain set of muscles of the shoulder—deltoid muscles—could not raise his arm more than to that level. In trying to raise it any higher you would find it was stiff, so that it would raise his whole body; then again in my recent examination I find that if there was thickening of the cord that it was subsiding to a certain extent, but this ankylosis—that is in such condition that it cannot be broke up.

Q. State to the jury what ankylosis is.

A. Stiffness of a joint.

220 Q. Then the ankylosis that you refer to is stiffness of the left shoulder?

A. Yes, sir.

Q. Right in the left shoulder?

A. Stiffness of the left shoulder. It may have been due to inflamation of the joint itself; but this particular stiffness in this case dates from the injury—that is, it began to get stiff after the accident. He went to California; I think he was gone some—I don't know just how long he was gone—some time, and when he came back I examined him and I found the joint almost completely stiff, and in my recent examination I found it entirely so; of course, there is certain movements he can make. He can move it, but when it comes to raising his arm it is impossible for him to do it. I have attempted to raise it a number of times, and I examined it pretty thoroughly and manipulated it pretty thoroughly. If it were paralysis there would be wasting of the muscles, atrophy. We sometimes have what we call local paralysis, paralysis of one muscle or one set of muscles when the other muscles are active; you can use some of them. This elbow joint is perfectly natural. If it was rheumatism it would be liable to attack other joints. It is seldom that rheumatism is in just one joint, and as near as I can get at the history of the case he never suffered any from rheumatism. When I first saw Holmes he was a comparatively healthy man, until he met with this accident, but he has gradually run down since that time.

Q. Doctor, suppose that a man is unable to hold his urine, would that be any indication with reference to an injury of the spinal column?

A. Yes; it might possibly be paralysis of the neck of the
221 bladder. I have never examined Holmes' urine; never ex-
amined him in reference to his urine. He has spoken to me several times about having trouble with his urine, getting up nights to pass it. He has spoken to me several times about his back paining him. The only place that I can find that is very sensitive to the touch is right between the shoulders, and when I examined him further down the sensitiveness there seems to be diffused.

Q. State whether or not there is a general sensitiveness about the small of the back and loins.

A. On pressure?

Q. Yes.

A. He complains of sensitiveness at all times; complains of pain there, but on pressure I do not notice anything particular as to sensitiveness.

Q. No particular locality?

—. ——.

Q. What would pain in the loins and small of the back and incontinence of urine indicate, Doctor, in connection with these other symptoms?

A. Might indicate paralysis of the neck of the bladder. He might have some diabetic trouble. He might have trouble with Bright's disease; something of that kind.

Q. Have you seen any indication of such troubles?

A. I have not seen any indication of such troubles. I have not, in fact, examined his urine at all nor examined the condition of his bladder. Nor have I ever examined in reference to see in reference to his shoulder; he was complaining of that more particularly. It was paining him nights so that he could not sleep, could not get his coat off, and had to have assistance to get it off. He was anxious the first time I examined him, but he came back
particularly with reference to the shoulder. He was afraid
222 that he could not get the use of it, and it was worrying him
considerably.

Q. Was your attention directed at the time you made these examinations as to whether or not he was simulating or pretending a soreness?

A. Yes; the first thing I thought of was that the old gentleman might be simulating, knowing that he had a case against the railroad; that he might attempt to simulate. But it would have been impossible for Holmes to simulate to such an extent that he can tell exactly where the soreness is each and every time and on pressure right where it ought to be.

Q. What is your impression with reference to pretention on his part?

A. I do not think there is pretention. As far as his shoulder is concerned there is no pretension. That shoulder will show for itself. This other trouble I know nothing about.

Q. Have you any opinion as to how long Holmes will probably live?

A. Of course, we all have an opinion. Mr. Holmes might live——

McNaught: Don't answer what that opinion is yet.

Q. You say you have an opinion?
A. Yes, sir.
Q. Is that opinion based on an inquiry into his case and the disease under which he is now suffering?
A. Yes, sir.
Q. What is that opinion?

McNaught: We object.
Andrews: I insist on the question.
The Court: I will overrule the objection.
McNaught: We will save an *objection*.

223 A. I think that if Mr. Holmes were to go away, probably a change of climate where his surroundings are better, that he will live four or five or six years; he may live longer. He might not live so long. He is running down. His general health is running down. He is not near the man that he was six months ago. He is suffering more or less all the time. He is scarcely ever free from pain—it certainly will shorten his life.

Q. You say that such an injury as he claims to have received, and the symptoms manifested by him, tend to materially shorten his life?

A. Yos, a man of his age. If he was a young man he might in time overcome it. The probabilities are he would not if he was only 20 years old.

Q. Doctor, I will ask you another question: What is Mr. Holmes condition with reference to being able to earn a liv-lihood at any physical or mental employment?

A. Physically, he never could earn a liv-lihood for himself. His mental—I don't know but what Mr. Holmes' mental condition, except his anxiety about himself and worry and the pain he suffers, is about as acute as it ever was, but — physical labor he will never be able to earn a liv-lihood—never be able to do a day's work.

Q. Just repeat your last statement.

A. At physical labor he will never be able to earn a liv-lihood. I do not think he will ever be able to do a day's work.

Q. What is your impression with reference to his being helpless or only partially helpless?

A. He is helpless to that extent that he cannot help himself. He has to be, as I stated before, helped with his clothes on and off.

Q. Doctor, do you desire to make a demonstration with Mr. Holmes before the jury?

224 A. I would like to show the jury that shoulder if there be no objections.

Q. Do you want him to take off his coat?
A. Yes; his coat, vest, and shirt.

(Plaintiff here complied with request of witness and stood up before the jury and the witness showed the jury to what extent plaintiff's left arm could be moved.)

This, gentlemen, is stiffened (indicating shoulder), whether it is from paralysis, that might be, a few of the muscles here. This is the deltoid muscle that raises the shoulder, at the same time it has a tendency to draw it back in that position. Now, in his spine it is very ha-d to simulate that; right on this vertebra there is where one of the cords of the brachial plexus is given off; that supplies this muscle. There is a little nerve given off, if I remember right. I think from the posterior cord they come out and branch off here, one from the 5th and sixth cervical vertebras and the seventh and eighth and first dorsal. The seventh and eighth is a prominent one, and that is where he experienced the pain. If there was paralysis here, you can see that there is no great difference in the development of the muscles. In fact, by actual measurement, this arm (indicating the left arm) is larger than the other. I cannot account for that. We would naturally expect in paralysis that his arm would be smaller, would atrophy. I believe I made that statement to the jury before. Now, it is possible, he says, he fell on this shoulder and head——

McNaught: I think we will move to strike that out.

The Court: What Mr. Holmes told you is not admissible.

Andrews: It has not been a contested fact in this case but what he did fall on his head and shoulder.

The Court: I do not think a statement about that would have any bearing.

225 Witness: This might be produced from injury direct to the shoulder; might possibly been produced by injury direct to the shoulder itself and set up inflam-ation, and in the process has thrown out plastic material until it has gradually thickened until it has become ligamentous.

Q. Show the jury the operation of the other shoulder.

(Witness here showed the action of both arms and shoulders of the plaintiff.)

Q. Have you noticed anything else with reference to Mr. Holmes' condition that you think worth while to speak of?

A. No, sir.

Q. Doctor, has your attention been called particularly to the plaintiff's memory since the accident?

A. Yes; since last court I have noticed that particularly. His memory seems to be good.

Q. You testified with reference to a wound on the skull?

—. Yes, sir.

Q. Would such a sore as you saw there result in a fall upon the head?

A. Yes; it would result in a fall upon the head.

Q. Was that a sore of the bone or skin over the bone?

A. The skin was severed and split apart and the bone was injured. It was injured to such an extent that there was necrosis—

that is, the bone broke down, degenerated and sloughed off. I think it was over a year getting well.

Q. Explain the difference between a necrosis and a fracture.

A. A fracture is where a bone is broken into. Necrosis is a diseased condition of the bone; it is decayed, so to speak; rotten.

226 Q. With reference to a person's walking, suppose that a man received such an injury as testified to here, and walks about one-half or one-quarter his usual speed?

A. Well, I don't know that it would indicate anything more than just a weakness, or indicate any paralysis or anything of that kind.

227 Cross-examination.

By Mr. McNaught:

Q. You stated last, Doctor, I believe, that persons walking slowly might result from various causes?

A. Yes, sir.

Q. Old age?

A. Yes; and general debility.

Q. Inactivity, generally?

A. Might result from heart disease or some diseased condition of the lungs.

Q. You stated, Doctor, I believe, that you did not examine his urinary organs?

A. Yes, sir.

Q. To determine what was the cause, if there was any incontinence of the urine?

A. Yes.

Q. I believe you stated that might be caused by Bright's disease or other causes?

A. Yes, sir.

Q. Causes entirely foreign to this fall?

A. Of course, any of these diseases are liable to arise in any one.

Q. And more especially liable to arise in one pretty well along in years; 56, 55 years old?

A. Oh, I don't know as to that. I think as a rule that Bright's disease makes its appearance long before that. As a rule if a man lives 50 years without suffering from Bright's disease——

Q. I was not speaking particularly of Bright's disease.

A. Oh, yes; diabetic troubles are liable to arise in any one.

Q. As well at old age as any other?

A. Yes, sir.

228 Q. And as a rule do they not grow worse with old age?

—. No; a person, a young man, is liable to suffer just as much as an old man; it is something that does not last long; it takes a man off in a hurry; it is a good deal like consumption—rushes a man through pretty fast.

Q. Still, they do have these ailments as well as young men?

A. Yes, sir.

Q. And the consequences are usually the same?

A. Yes, sir; debility, running down.

Q. Where the person is old and generally breaking a little, are not, as a rule, these diseases more fatal and serious?

A. Yes; more fatal and serious on one that is breaking.

Q. They have a tendency to shorten one's life?

A. Yes, sir.

Q. And in making up your opinion as to the length of time that Holmes will probably live you have taken into consideration——

A. I have taken into consideration the age and present condition of health.

Q. Now, you have spoken of ankylosis of the left arm and shoulder, stiffness of the shoulder, would that of itself have any effect on the duration of his life?

A. The stiffness of the shoulder alone would probably not shorten his life, but a man suffering pain from day to day, due to the thickening or pressure brought to bear in regard to the shoulder itself, would probably shorten his life, especially a man along in years.

Q. The ankylosis itself *itself* does not cause the pain?

A. The ankylosis, if the arm is kept quiet, does not cause pain. The pain is caused from the spine itself.

Q. Now, ankylosis may be caused to some extent and increased, may it not, by non-use?

229 A. Non-use will increase it; yes, sir.

Q. You did not see Mr. Holmes for some four weeks after he was said to have been injured?

A. Yes; I think it was between three and four weeks; he was then visited by Dr. Olds. I think it was along about the first visits there after he got out of bed.

Q. You know nothing of his condition before?

A. No.

Q. Knew nothing of his injuries, except as they were told you?

A. Except as they were told me.

Q. He has perfect use of his right arm, Doctor?

A. Yes, sir.

A. And the left arm, he can use that by moving it backwards and forwards, and move the elbow in any way.

A. Yes; has perfect free use of it.

Q. Now, Doctor, if it was paralysis of the shoulder and left arm, do you think he would have perfect use of that elbow?

A. Yes; he might have perfect use of the elbow, paralysis of this deltoid muscle, just local paralysis. I think that is what it was in the beginning. That was my diagnosis at the time.

Q. Your opinion is the trouble with the left shoulder is paralysis, local paralysis?

A. That was my opinion at that time. I think, though, now that the thickening of the cord, as I probably observed, has left his shoulder in the condition we find it in now.

Q. Is that your opinion now, that the whole trouble with that shoulder is paralysis?

A. My whole opinion now is that it was ankylosis, but it was due to paralysis.

230 Q. Is there any paralysis there now?

A. Of course there is to this extent: that the muscles lie quiet, and you cannot use them, and from the ankylosis the muscles lie dormant, and before this time——

Q. Now, Doctor, if that was paralysis would there not be atrophication of the muscles?

A. There would be atrophy of the muscles providing the stimulants were taken away. If the nerve that supplies this particular muscle is interfered with two years ago or two years and a half ago, in the course of time this pressure was relieved, then the muscle would receive some stimulant, excepting it would atrophy to some extent if the arm was not used.

Q. Instead of atrophying it is enlarged.

A. This appears to be over stimulated — some cause or other which I cannot determine. It goes to show that he has attempted to move the arm from time to time—one thing which has developed the muscle; but then the undue enlargement I cannot account for.

Q. Were there any wounds or bruises on that shoulder at the time you examined it?

A. At the time I examined it there were no bruises on the shoulder. He was complaining to me. He says, Doctor, it hurts me right here; hurts some on the shoulder.

McNaught: I am not asking what he says.

Andrews: I think it is proper.

Q. What wounds, externally or otherwise, did you discover at the time you made the examination?

A. Discovered this wound on his head.

231 Q. Any other?

A. No other wound.

Q. You mean by wound any bruises?

A. I mean by wound something I can see just by looking.

Q. Is there any other enlargement of the shoulder-blade or the limb—on the left shoulder-blade—of Mr. Holmes?

A. No; there is an enlargement of the joint—the joint is excluded, filled up with plastic material, ligamentous—but I do not think the enlargement of the joint would cause an enlargement of the muscles below. That is a matter that I cannot account for.

Q. Now, Doctor, that original paralysis, if there was paralysis, may have been caused by many things, may it not—things other than his falling out of the wagon?

A. It might have been caused by sudden hemorrhage, but, taking into consideration the case, the condition of the man I saw him in, and the idea he had of falling—he was suffering from this at that time—went to show that it was concussion, but that concussion might have been produced, as I said in my direct examination, by trifling causes; might have been produced by a severe fall or a lighter fall. It is not the real force of it—of course the greater the force the greater the injury.

Q. Does not paralysis appear in a person often without any known cause for it, so far as the person himself is concerned?

A. Yes; sudden paralysis might appear from no known cause. Of course paralysis, as a rule, involves a great portion of the body—hardly ever local. Sometimes we have paralysis of the neck, of the bladder, and paralysis coming on suddenly involving half of the muscles of the body probably.

231½ Q. It may be caused by lifting a little too much, overexertion, or various causes?

A. Yes, sir.

Q. You discovered at the time of your examination concussion of the spinal cord. Now, may not concussion of the spinal cord be caused by sudden shock or overexertion?

A. It may be caused by sudden shock or jar.

Q. One way you have of determining that there is concussion of the spinal cord, if I understand, is by soreness?

A. Yes, sir. First we take into consideration the history of the case and find out how the man fell and when he fell and how far he fell and take into consideration these things, and then from a physical examination.

Q. And reach the conclusion that there is concussion of the spinal cord?

A. Reach that conclusion if there is proper symptoms there.

Q. That concussion of the spinal cord might have been caused by something else?

A. It might have been caused by some other fall. That was the fall that we were dating it from.

Q. That was the notion you had at the time of the examination?

A. Yes, sir.

Q. And from these facts at that time you are speaking and making up your mind?

A. Yes, sir.

Q. Now, Doctor, rheumatism may at times enlarge a joint?

A. It very often does.

Q. And enlarge also a muscle?

A. Any undue stimulant at times will enlarge a muscle, but rheumatism, as a rule, is hardly ever local enough confined to just one joint.

232 Q. Now, Doctor, in the early stages of rheumatism, as a fact, does it not appear in one joint or a particular muscle?

A. Hardly irregular rheumatism. It may appear in one joint, but it is traveling, shifting; it involves one joint and then another, and you hardly ever—you might, in fact, say never—see a case of rheumatism where one joint is enlarged and not another.

Q. It might be — case where it would appear in the shoulder and hips?

A. In the shoulder and in the other shoulder or elbow. If it appears in the shoulder it will appear in the elbow and down the limb and in the fingers.

Q. Now, the prickling sensations spoken of in your examination-in-chief, might not that come from the injury following rheumatism, injury caused by rheumatic pains and disease?

A. The prickling sensations are due from pressure on the nerves. It might be in the region of the cord or nerve, and if rheumatism having enlarged a joint in such a way that it brought pressure to bear on such a nerve distributing to certain parts it would produce that trouble, but not as a rule. I do not know that I ever saw a case of rheumatism where this prickling sensation occurred. I never seen a case, but it is possible that it might do that.

Q. Now, you speak, Doctor, of simulating so far as the shoulder is concerned; of course, that enlargement shows for itself?

A. No; that ankylosis could not be simulated.

Q. So far as the internal derangement is concerned, as far as you know, might be simulated?

A. How do you mean?

Q. So far as the trouble with the urinary organs are concerned?

233 A. That trouble, I never examined into it at all. That at all times Holmes came to me and told me about having trouble, having to get up in the night and urinate; mentioned the fact that it bothered him considerably, but the pain seemed to be principally in the shoulder, and that is what seemed to be worrying him, and the pain in the cords of the spine. It would be hard for him to simulate this tenderness in the right spot unless he was posted by some one.

Q. He might have been posted?

A. Then it would be pretty hard for me to get on to it.

Q. He probably would be posted if he was suing the railroad company for damages?

Andrews: We object.

Q. You said his memory was good?

A. Yes, sir.

Q. It is rather improving, is it not, than otherwise?

A. His memory?

Q. Yes, sir.

A. Oh, I don't know; his memory seems to be pretty good. I have never paid particular attention until within the last six months. Still, at the same time, he seems to be worried a good deal in mind.

Q. You have noticed his memory for the last few months. Have you noticed his power of concentration, recollection of things passed years ago and a few months ago, in the last five or six months?

A. For the last five or six months—in fact since court here.

Q. You have observed the fact that it was good?

A. Yes; very good.

Q. Power of concentration of his mind seemed to be fair?

A. Seemed to be fair, but sometimes he is kind of worked up about his present condition, and he worrys and frets and stews.

234 Q. Other than that he is all right; if he would not worry and fret and stew so much he would be better?

A. Under his present condition I would fret and stew too.

Q. You spoke, Doctor, of the bone in the skull being diseased. What is the cause of its being diseased?

A. The skull is protected like all other bones, what we call a periosteal membrane that surrounds the bone. This membrane protects the bone and is really the nutriment to the bone. When he received this injury it just pe*a*led it right off and exposed the bone, and it necrosed and broke down, but finally was covered with a new periosteum and got well.

Q. Do you think, Doctor, that the treatment he had had a tendency to aid it?

A. No, sir; I think his treatment was good; as far as that wound was concerned it was good.

Q. Best of care was given him?

A. Yes, sir; I did not attend it myself, or probably I would not say so. Dr. Olds treated him and I saw him from day to day, and I think the treatment was good.

235 Redirect examination.

(By ANDREWS:)

Q. I want to ask you particularly with reference to his power of concentration of mind as contradistinguished between his power of memory. Is there a difference between the two?

A. I think his memory is a good deal better than his power of concentration. He seems to remember. I have talked with him some about his trouble all the way through. His memory seems to be better than I would naturally expect it in one of his present condition. It is good.

Q. Doctor, have you seen any case in surgery where in case of paralysis the limb affected with paralysis has swelled before shrinking and grown in size for more than a year, possibly two years?

A. Yes, I have seen cases where nerves were stimulated that would produce an unusual stimulation of the muscles or hypertrophy.

Q. Then enlargement is characteristic of paralysis?

A. Sometimes it is in the early stages of paralysis.

Q. Was this case so well established as to be accepted as a fact in surgery?

A. Yes, sir.

Q. Suppose a person's arm that had become ankylosed from nonuse, would not all the joints in the arm become stiffened as well as any particular one?

A. No, I don't know as to that, if one particular joint is kept quiet; it would have to be kept very quiet in order to produce ankylosis; it would have to be bound or exceedingly quiet.

236 Recross-examination.

(By Mr. McNaught:)

Q. In reference to that enlargement of the arm you state that enlargement sometimes appears in case of paralysis in the early stages. When did you first notice the enlargement in this case?

A. In my more recent examinations.

Q. Did you ever measure his arm until recently?

A. I measured his arm before last court, some time before that, and at that time it was not quite as large; it was a little smaller I think, if I remember right, by a quarter of an inch.

Q. So your observation is that his arm has been growing from that time till this?

A. My observation is that there was paralysis at that time and that the paralysis produced ankylosis, and now atrophaction is taking place where the pressure was brought and is gradually passing away as far as the pressure is on the nerve, but the ankylosis, I think, is permanent and cannot be broken up.

Q. That is your impression about it?

A. Yes, that is my impression.

237 W. H. White, a witness on behalf of the plaintiff, being duly sworn, on oath testified as follows:

(By Mr. Andrews:)

Q. Where were you on or about the first of November, 1883?

A. Well, sir, I took a ride with Mr. Holmes; I don't know that I could name the place.

Q. You were with Holmes on that day, were you?

A. Yes, sir.

Q. Mr. White, you are the person that Mr. Holmes refers to as riding with him out into the country?

A. I believe so.

Q. Do you know whether or not he had any liquor with him that day?

A. He had a small bottle.

Q. Do you know how much he drank?

A. Four, five, or six drinks, perhaps.

Q. Do you know what his condition was at the time he came into Sprague?

A. Well, I think he was pretty sober.

Q. How far, if you know, was he from Sprague when he took his last drink?

A. Oh, I could not say as to that; maybe four, five, or six miles, perhaps; maybe further.

Q. You say he was sober?

A. I think so; yes.

238 Cross-examination.

(By Mr. McNaught:)

Q. Do you remember how many times he drank on that day?

A. He drank five or six times; perhaps more, or it may be less.

Q. He had a flask of whisky?

A. Yes, sir.

Q. You, I believe, also had a bottle of whisky?

A. Yes, sir.

Q. He drank out of your bottle occasionally and you out of his?

A. Yes, sir.

Q. Do you remember how many times he drank out of your bottle?

A. No, I do not; about as often as I did, I guess; he could not get ahead of me much.

Q. You generally endeavored to make things even up?

A. Yes; about even.

Q. You say the last time he took a drink before coming into Sprague you think was five or six miles out?

A. Yes, sir; I think it was about five or six miles out.

Q. When you got into Sprague he drove directly to your place of business, your saloon?

A. Yes, sir.

Q. You got out?

A. Yes, sir.

Q. What did he do then?

A. Turned around and started back for the stable to put the team up.

Q. Do you remember the last conversation with him when you took the last drink with him coming in on the road?

A. No, I do not.

239 Q. Do you remember his saying to you anything about your taking a drink, when you told him you had enough?

A. No; I do not remember anything about that.

Q. Did you have any conversation of that kind?

A. I don't remember of it.

Q. Either you with him or he with you?

A. No.

Q. You do not remember any conversation of that kind?

A. No.

Q. Don't remember your asking him to take a drink, when he said he had enough?

A. No, sir.

Q. Well, you say that he was pretty sober?

A. I think so; yes.

Q. How much whisky does it take to make him drunk?

Andrews: We object. There is no evidence that the witness knows how much whisky it takes to make him drunk.

The Court: You ought to lay the predicate for it.

Q. Where did you start from that morning, your place of business?

A. Yes, sir.

Q. Do you remember how many drinks Holmes took before he started?

A. No; I do not. I don't know that he took any.

Q. Might have taken sly drinks and you not know it?

A. Might have perhaps somewhere else.

ANDREWS: Do you recollect his drinking before starting from your place?

A. No, sir.

240 In the District Court, First Judicial District, Territory of Washington, Holding Terms at Cheney, Spokane County, Territory of Washington.

JAMES HOLMES, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.
} Notice to Take Depositions.

To James McNaught, Esq., attorney for The Northern Pacific Railroad Company, defendant, Seattle, Wash. Ter.:

You will take notice that the depositions of Dr. N. Martin and Dr. M. W. Wilson, witnesses on behalf of the plaintiff in the above-entitled action, to be used in the trial thereof, will be taken before G. H. Colby, Esq., a notary public in and for the county of Placer, in the State of California, at his office, in the town of Dutch Flat, in the county of Placer, on Monday, December 22nd, A. D. 1884, between the hours of 9 o'clock a. m. and 4 p. m. of that day, commencing at 9 o'clock a. m., and if not completed on that day the taking thereof will be continued from day to day successively thereafter and over Sundays, at the same place, until completed.

And you will also please take notice that hereto attached you will find a copy of the interrogatories to be administered to said witnesses.

And you are also requested to serve upon the undersigned a copy of the interrogatories to be administered in your behalf upon the cross-examination of said witnesses.

J. STUART WILSON AND
T. S. ROADMAN,
Plaintiff's Attorneys, Sprague, W. T.

I hereby accept service of the within notice and the interrogatories thereto attached by receiving a copy thereof this twenty-sixth day of November, A. D. 1884.

F. P. WEYMOUTH,
Sup't N. Pac. R. R. Co.

241 In the District Court, First Judicial District, Territory of Washington, Holding Terms at Cheney, Spokane County, Washington Territory.

JAMES HOLMES, Plaintiff, *vs.* NORTHERN PACIFIC RAILROAD COMPANY, Defendant.	Deposition of Dr Noble Martin.

Be it remembered that pursuant to the foregoing notice hereunto annexed and on the twenty-second day of December, in the year of our Lord one thousand eight hundred and eighty-four, at my office, in the county of Placer, State of California, before me, G. H. Colby, a notary public in and for the said county of Placer, duly appointed and commissioned to administer oaths, &c., personally appeared Dr. Noble Martin, a witness produced on behalf of the plaintiff in the above-entitled action, now pending in the said court, who, being by me first duly sworn, was then and there examined and interrogated by me (no attorney appearing on the part of either plaintiff or defendant) and said examination commenced at nine o'clock a. m. of said day and continued until four o'clock of the same day, at which time the said examination of said witness was adjourned until nine o'clock on the following day. At nine o'clock on the twenty-third day of December, of said year (1884), the said examination of said witness was resumed and completed on the same day before four o'clock of the said day.

And the said Dr. Noble Martin, being then duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows, to wit:

242 Dr. NOBLE MARTIN, being duly sworn, deposes and says:

1st interrogatory. Question 1. What is your name, age, occupation, and place of business?

Answer 1. Noble Martin; age, sixty-four years; physician and surgeon; place of residence, Dutch Flat, Placer county, State of California.

Int. 2. Question 2. How long have you resided where you now reside?

Answer 2. In Dutch Flat nearly fifteen years and in the vicinity thirty-one years.

Int. 3. Question 3. How long have you been a practicing physician?

Answer 3. About thirty years.

Int. 4. Question 4. How long have you practiced your profession where you now reside?

Answer 4. Fifteen years the second day of next month.

Int. 5. Question 5. Are you a graduate of any medical college?

Answer 5. No; but I have a license from the board of examiners of the medical society of the State of California, issued Dec. 23rd, 1876, as required by the laws of the State.

6th interrogatory. Question 6. If yea, of what medical college are you a graduate? And, if not, state how you are qualified to practice medicine.

Answer 6. By having a license, as required by the laws of this State.

243 7th interrogatory. Question 7. Are you acquainted with James Holmes, of Dutch Flat, Placer county, State of California?

Answer 7. Yes.

8th Int. Question 8. If so, state how long you have been acquainted with him, and also state where.

Answer 8. Over twenty years, in Nevada and Placer counties, State of California.

9th Int. Question 9. Have you been called upon at any time within the present year to render professional services? And, if yea, state when and where you were first called upon to treat him professionally.

Answer 9. About the middle of last April, in my office, in Dutch Flat.

10th Int. Question 10. In what condition did you find him when you first visited him?

Answer 10. Suffering from injuries of the head, shoulders, and back.

11th Int. Question 11. What was his general appearance?

Answer 11. Unhealthy.

12th Int. Question 12. Did you find him affected with injuries of any kind when you first visited him? And, if so, describe them as nearly as possible and locate them with as little technicality as may be.

Answer 12. Yes; a depression on the top of the head, indicating a fracture of the skull, stiffened left shoulder, with but a slight movement of the arm, soreness of the back over the locality of the kidneys, incontinency of urine, with indications of paralysis of the left side.

244 13th Int. Question 13. In your opinion what was it that caused his injuries, if any?

Answer 13. External violence, such as blows, &c.

14th Int. Question 14. How and in what manner do his injuries, if any, affect the functions and general usefulness of his urinary organs?

Answer 14. By paralyzing, more or less, the sphincters of the bladder, causing incontinency of urine.

15th Int. Question 15. How and in what manner, if at all, do his injuries affect the health, activity, and usefulness of his brain?

Answer 15. By impairing memory in some degree, indicated by the repetition of the same subject, giddiness, and pain in the head.

15th Int. Question 15 repeated. How and in what manner do his injuries, if any, affect the health, activity, and usefulness of his brain?

Answer 15 repeated. By impairing memory in some degree, indicated by repetition of the same subject. giddiness, and pain in the head.

16th Int. Question 16. Did you observe any external injuries of his head? And, if so, describe and locate them as nearly as you can.

Answer 16. Scars, indicating wounds of the scalp, and depression of the skull at the top of the head.

17th Int. Question 17. How and in what manner, if at all, do these injuries, if any, affect the brain of the plaintiff?

Answer 17. By depression of the skull would cause pressure upon the brain.

245 18th Int. Question 18. How and in what manner, if at all, do these injuries to the head of the plaintiff affect his general health, as well as his intellect?

Answer 18. Would cause nervous debility, which would affect both body and mind.

19th Int. Question 19. Have you observed or discovered any injuries of plaintiff's spinal cord or column, either external or internal? And, if so, describe the location and extent of the injury.

Answer 19. No injury perceptible externally.

20th Int. Question 20. Describe the effect of the injuries, if any, to the spinal cord of the plaintiff.

Answer 20. It has ca-sed neuralgia pains, with a tendency to paralysis.

21st Int. Question 21. How and in what manner do the injuries to the plaintiff's spinal cord affect his general health?

Answer 21. Has caused nervous and muscular debility.

22d Int. Question 22. Describe the symptoms affecting the spinal cord of plaintiff at the seat of injury, if any.

Answer 22. Pain across the small of the back, with difficulty of urinating.

23d Int. Question 23. How and in what manner do the injuries, if any, of the plaintiff's spinal cord affect other parts of the system? And state what parts, if at all, or organs, are so affected and how they are affected.

246 Answer 23. More or less difficulty of the left side, difficulty of the bowels and bladder; also giddiness and pain in the head.

24th Int. Question 24. Describe how and in what manner the bladder and its appendages are affected, if at all, by injuries, if any, of the plaintiff's spinal cord.

Answer 24. By a frequent desire to urinate.

25th Int. Question 25. How and in what manner do these injuries, if any, affect the functions and general usefulness of the bladder of the plaintiff, and how is his general health affected thereby?

Answer 25. By rendering the bladder incapable of distention, by paralyzing the sphincter muscles, producing a morbid condition of the mind, with a loss of physical powers.

26th Int. Question 26. State to what extent and in what manner the spinal column or the back of the plaintiff is injured, if at all.

Answer 26. The only evidence is the sympathetic effect upon the system.

27th Int. Question 27. State whether the shoulder of the plaintiff is injured; and, if so, state to what extent and in what manner does it affect the usefulness of his arms.

Answer 27. The left shoulder is stiffened, very little motion at the joint; is unable to raise his arm at right angles with his body.

247 28th Int. Question 28. Have you observed any indications of paralysis upon any portion of plaintiff's body; and, if so, state when and on what portion of the body it is so affected and to what extent?

Answer 28. He does not appear to have feeling or control of his left side as much as the right side. It is more apparent in his left arm.

29th Int. Question 29. What is the cause of paralysis?

Answer 29. There are many causes, but the most common cause is external violence.

30th Int. Question 30. What is the cause of concussion of the brain or the spinal cord?

Answer 30. Mechanical injuries, such as falls, blows, &c.

31st Int. Question 31. What is concussion of the brain or spinal cord?

Answer 31. It is a shock to the nerve center.

32d Int. Question 32. What would be the effect of concussion of the brain or spinal cord upon the human system?

Answer 32. Different effect upon different persons, more or less paralysis, dementia, &c.

33d Int. Question 33. How may concussion of the nervous system of the human body be produced?

Answer 33. By blows, falls external violence, &c.

248 34th Int. Question 34. How and in what manner does concussion of the brain or spinal cord affect the sight, the hearing, the sense of smell and touch, and also that of tasting?

Answer 34. It might produce double vision, short sightedness, and destroy the normal forces, also produce partial or complete deafness. It might derange the sense of smell, touch, and taste.

35th Int. Question 35. How and in what manner does concussion of the spinal cord or brain affect the capabilities of the mind?

Answer 35. By injuring the reasoning faculties in a more or less degree.

36th Int. Question 36. State whether you have discovered that either or any of the five senses of the plaintiff are affected; and, if so, how and in what manner.

Answer. I have not examined as to his five senses to know if they have been affected.

Int. 37. Question 37. State whether, in your opinion, the capabilities of the mind of the plaintiff are in any way affected; and, if so, state how and in what manner.

Answer 37. Yes; he is not the man mentally that he was before he was injured. He is continually brooding over his misfortune and in a despondent condition.

38th Int. Question 38. State how and in what manner the sphineter muscles and the internal organs of the body are affected by concussion of the spinal cord or brain.

Answer 38. By being unable to perform their normal duties.

249 39th Int. Question 39. State whether in your opinion the sphineter muscles and the internal organism of the plaintiff's body are affected; and, if so, state how and in what manner they are affected.

Answer 39. By the statement of the plaintiff I learn that he is unable to retain urine but a short time and that he is troubled with constipation. I have given him treatment for the same.

40th Int. Question 40. What is the condition of the plaintiff's health now in comparison with what it was when you first called upon — during the present year to treat him professionally?

Answer 40. From about the middle of April to the first of October last I treated him professionally but saw no improvement.

41st Int. Question 41. How long, in your opinion, will the present condition of plaintiff's health continue?

Answer 41. It is my opinion he will never be a well man again.

42d Int. Question 42. What is the present condition of plaintiff's health?

Answ-r 42. It was very poor the first of October last. I have not seen him since.

43d Int. Question 43. How many times have you been called upon by plaintiff to treat him professionally since you first saw him in his present condition?

Answer 43. He has consulted me (at my office) about twice a week, from the middle of April to October 1st, 1884.

250 44th Int. Question 44. What has been the value of your professional services which you have rendered the plaintiff during his present sickness and for his treatment by you?

Answer 44. One hundred dollars.

45th Int. Question 45. How and in what manner do all the disabilities and sickness of the plaintiff and his present injuries affect his general usefulness as a workingman?

Answer 45. It renders him unable to perform the ordinary duties of a workingman.

46th Int. Question 46. Do you know of anything else of and concerning the matters in question that may tend to the benefit and advantage of the plaintiff? If yea, declare the same fully and at large as if you had been particularly interrogated concerning the same.

Answer 46. No; nothing more than given in preceding answers.

Dr. NOBLE MARTIN.

251 STATE OF CALIFORNIA, } ss:
County of Placer, }

I, G. H. Colby, a notary public in and for the said county of Placer, do hereby certify that the above deposition was taken before me and reduced to writing by myself, at my office, in the town of Dutch Flat, in said county, on the twenty-second day of December, A. D. 1884, commencing at nine o'clock a. m. of that day and con-

tinued until four o'clock of said day, at which time the taking of said deposition was adjourned until nine o'clock a. m. on the next day, and the taking of said deposition was completed on the 23rd day of December, A. D. 1884, between the hours of nine o'clock a. m. and four o'clock p. m. of that day, in pursuance of notice hereto annexed; that the above-named witness, before examination, was sworn to testify the truth, the whole truth, and nothing but the truth, and that the said deposition was carefully read to said witness and then subscribed by him.

G. H. COLBY,
[SEAL.] *Notary Public.*

252 Dated at Dutch Flat, California, this twenty-third day of December, 1884.

STATE OF CALIFORNIA, }
County of Placer, } *ss:*

Dr. M. W. Wilson did not appear for examination in the said entitled action, pursuant to notice hereto annexed; hence his deposition does not appear.

In witness whereof I have hereunto subscribed my name and affixed my seal of office this twenty-third day of December, A. D. 1884.

G. H. COLBY,
[SEAL.] *Notary Public.*

253 Deposition of Dr. N. Martin read to the jury by Mr. Andrews.

JAMES HOLMES recalled:

(By Mr. ANDREWS:)

Q. I want to direct your attention to Mr. Fish's testimony. Did you or did you not hear Mr. Fish speak to you while you was on the crossing?

MCNAUGHT: We object.
The COURT: Objection overruled.
MCNAUGHT: We except.

A. I heard no one speak to me or give me any notice or check me in any shape. I heard no one; saw no signs.

Cross-examination.

(By Mr. MCNAUGHT:)

Q. Do you think you could hear a clap of thunder that day, Mr. Holmes?

A. I am no deafer today than I was then, and I can hear your voice very clear.

Q. Did you see Mr. Fish when he passed you?

A. I saw two teams.

Q. How near to them were you when you passed them on the crossing?

A. They had room for their wagons to pass.

Q. How far were they from you?

A. I cannot state the distance that there was between our wagons; there was not much.

Q. About how much?

A. I cannot state how much.

Q. Any impression at all as to the amount?

A. There could not have been more than two or three feet.

Q. They you were not more than eight to ten feet from him?

254 A. I was not over 10 or 12 feet.

Q. Did you see Mr. Peterson as he was standing there that day?

Andrews: That is not cross-examination.

McNaught: I would like to know whether they intended the answer of the witness to apply to Fish'- as well as Peterson's testimony.

Q. Did you see Peterson that day?

A. Not that I know of. I don't know that I did.

Q. Don't remember seeing him at all?

A. No, sir; not at that crossing?

Q. Or any other place?

A. No, sir; I don't remember seeing him.

Q. Were you keeping a lookout all the time when you were approaching the track as well as when you were on the crossing?

A. I was looking at Romick and up to my left and listening.

Q. What was you looking up to your left for?

A. That was the way the train went; the train went that way.

Q. What was you looking that way for?

A. I thought—the view was all clear below, and I could see for a mile below. I think I am safe in saying a mile. I knew there was no danger there. I could not see any distance above.

Q. What were you looking for?

Andrews: We submit that is not cross-examination, and counsel has been into that matter on cross-examination of his witness.

The **Court**: I have granted you indulgence twice, and if counsel go a little over the margin I am not disposed to hold them to strict accountability.

Q. What was you looking that way for?

A. I was looking that way—I thought if there was danger at all it would come from that direction, if there was any at all. I was looking and listening.

255 By consent the testimony of Dr. J. W. Johnson, taken at last trial and reported by plaintiff's stenographer, was read to the jury by Mr. Andrews.

Andrews: We will offer in evidence a certified copy of the town plat of Sprague, filed by the Northern Pacific Railroad Company in the auditor's office, in Spokane county. This is the same plat that went in the other time.

The Court: I suppose counsel have the same objections to it?

McNaught: No objections, your honor.

Plat attached hereto.

Andrews: This, gentlemen, is simply a plat of the town of Sprague filed in the office of the county auditor of Spokane county.

Andrews: We rest.

256 Dr. Johnson sworn:

Q. Where do you reside?

A. Cheney, Spokane county, W. T.

Q. How long have you resided here?

A. Almost two years.

Q. What is your business?

A. Physician and surgeon.

Q. How long have you been practicing as a physician and surgeon?

A. Something over 12 years.

Q. Are you a graduate of any medical college?

A. Of the St. Louis medical college.

Q. Do you know James Holmes, plaintiff in this case?

A. I have a slight acquantance.

Q. Have you made any examination with reference to alleged injuries?

A. Yes, sir.

Q. Do you know what his physical condition is at the present time?

A. Yes; I understand his condition.

Q. State the condition you found him in.

A. Well, I found him suffering from injuries of the head, shoulder, and spine.

Q. What injuries are there on the head?

A. There is a scalp wound.

Q. Describe the scalp wound.

A. There is a wound—a slight scalp wound—on the top of his head.

Q. What about the injuries of the spine; what did you discover?

A. I found a tenderness of the spine.

Q. In what place?

A. About the lower portion of the cervical vertebra between the shoulders. I also found a tenderness in the small of the back of the spine.

257 Q. Have you formed any opinion as to the ailment of the spine?

A. It is my opinion of the case, might have had concussion of the spine, but I consider this not the cause of his condition of walking.

Q. State whether that condition is a progressive one.

A. It is.

Q. What is a progressive disease?

A. It is what you say instead of getting over a disease it gets to a more serious condition.

Q. Now, suppose that a person had been thrown or fallen to the ground on the ground from 10 to 12 feet, lighting on the head, state whether or not it would result in a concussion of the spinal column.

A. It would result in the concussion of the spinal column; also a concussion of the brain.

Q. How long would it take to develope the symptoms?

A. It would be immediate.

Q. Well, would it necessarily?

A. They might develope slowly; a concussion of the brain would be developed immediately, in all probability; a concussion of the scalp might be developed immediately.

Q. In reference to the shoulder?

A. I call it an ankylosis or stiffened condition.

Q. State whether a fall by a person that was from 10 to 30 feet *to* result in a- anch*o*losis.

A. Yes, sir; it might from inf*or*mation, and possibly from paralysis the same would be in reference to being injured. The muscles that raise the arm, of course, would be paralyzed.

Q. I don't think the jury understand you. State whether paralysis might result from a concussion of the spinal column.

A. Yes, sir.

258 Q. Might it occur on one side of the body and not on the other?

A. Yes, sir.

Q. Might it to one part of the side?

A. Yes, sir.

Q. Now, Doctor, what is your opinion as to this shoulder in reference to this ankylosis, as to how it was produced?

A. It was produced from the same injury.

Q. Have you any personal knowledge as to the history of the case?

A. Nothing more than the history of the case.

Q. How long before it would take effect?

A. Sometimes a month, sometimes a short time.

Q. What is your opinion as to this anch*o*losis?

A. It is from the inf*or*mation of the joints.

Q. What produced the inf*or*mation?

A. A fall or hurt.

Q. Doctor, have you any idea whether or not the results are now upon him?

A. I think so.

Q. How soon will he be better at the present time?

A. Well, it is my opinion——

Q. Suppose, Doctor, that there was a concussion of the spinal column in the small of the back, might it not result in the incontinence of the urine?

A. Yes, sir; it is often the case.

Q. What is the probabilities of this incontinency of the urine in resulting in such a case?

Q. When the spinal column becomes impaired the condition of controlling the urine does at the same time.

Q. Would it get better or worse?

259 A. You could not better it any unless you could get the spinal cord in a better condition from what it was, but there is little show in this case.

Q. Can the plaintiff earn a livelihood as a carpenter?

A. No, sir.

Q. Can he perform any physical labor?

A. Yes, sir; he might drive a team—that would be termed physical labor.

Q. Doctor, what influence would these various things have upon a man—concussion of the spinal cord, paralysis *of* ancholosis, and incontinence of urine? What effect would these things have upon a man?

A. They would have a tendency to depress a man.

Q. Would they have a tendency to unnerve and excite the man?

A. Yes, sir; to some extent it would be like any other trouble.

Q. State whether or not physical labor would aggravate these troubles.

A. Yes, sir; physical labor would aggravate the spinal trouble; it would also produce more trouble in the urine organs.

Cross-examination:

Q. Dr., speaking of the urine organs, I will ask you if these organs become deranged from any other cause than from some shaking up of the physical system.

A. Yes, sir.

Q. I will ask you if this derangement and inability to control the urine does not appertain to all ages, conditions, and sects.

A. More particularly to the young and old; of course, all ages are subject to urine troubles.

260 Q. Irrespective to no accident or injury?

A. There is always a cause for these things; sometimes the cause is by some accident.

Q. Then you say that these things may be received by all persons, conditions in life?

A. Yes, sir; the old and young are more liable with these troubles.

Q. Are you able to say, as a professional man—I believe you were from St. Louis—was Dr. Taylor there?

A. It is before my day.

Q. Well, I will ask you as to the mental condition of Mr. Holmes. Have I understood you that you did not regard his mind as affected at the present time from the scalp wound; at the present time which you refer to? Am I correct?

A. Not being acquainted with Mr. Holmes before he received the scalp wound, I could not say whether it is affected from the scalp wound.

Q. You did not know Mr. Holmes?

A. I never saw him before last fall.

Q. You don't know what his mental condition was before the accident? Do you know his mental condition at the present time?

A. I think I understand it.

Q. Have you ascertained his mental condition from statements he has made in conversation?

A. I have conversed with him on subjects and I have observed his mental condition as well as I could do; also the physical condition. I think that the mind is impaired to some extent.

261 Q. Have you observed other persons that seem to be laboring under the same difficulties?

A. Yes, sir.

Q. I will ask you if you have not met in the course of your professional life pretentious characters that were laboring under the same weakness of intellect.

A. Yes, sir.

Q. Met with professionals who seemed laboring under the same difficulty?

A. Yes, sir.

Q. Do you — the persons that were laboring under believed injuries?

A. Yes, sir, always, because if I don't know them I can always observe it in their manner.

Q. Does this prove weakness of intellect? I will ask you if it — to your judgment and past experience if you can say that it exists from the injury as a result of the accident.

A. I think it is the result of the accident, for there might be a tendency through influence for the mind to be weakened to some extent.

Q. It may be — reference to the position?

A. Yes, sir.

Q. Have you discovered in Holmes an ailment of the intellect as the result of the accident that has a tendency to the intellectual senses?

A. I don't understand.

Q. Have you discovered in the case of Mr. Holmes between a weakness appertaining to the nerve as an effect of the accident?

A. I base my opinion on the history of the case itself.

Q. Have you discovered a difference in the intellect of Mr. Holmes from that of the person who might be laboring under 262 the same mental condition? Explain, if you can, the difference.

A. How was his physical condition?

Q. You are speaking of the intellectual; have you discovered?

A. There is a depression of the brain resulting probably from injury.

Q. You say it is probably resulting from the injury; might it not have resulted from another cause?

A. Yes, sir, it might.

Q. You don't know?

A. Only from the history of the case.

Q. You are unable to say Mr. Holmes' condition before the accident?

A. Yes, sir.

Q. Doctor, speaking of Mr. Holmes' physical condition, you are under an impression that his ailments will proceed and get worse?

A. I don't think that Mr. Holmes will ever be a well man. — of the history of this case that he will live a certain time and pass away. I base my opinion upon authority, such as "Hammond on the Diseases of the Nervous System."

Q. Taking it for granted that the authority — good, I will ask you if we don't all live a certain time and pass away.

A. I don't think any of us go to heaven without dying.

Q. I will ask you, Doctor, if a man lives in a high line of proceedings he is — a worse condition and pass-away sometimes rapidly.

A. If the man lives in a gluttonous condition.

Q. He will wear out?

A. Yes, sir.

Q. We take the case of Mr. Holmes. Can you say to this court and jury what particular difference there will be in passing away from the effects of any injuries that he has received without your knowledge?

263 A. Have I seen parallel cases?

Q. Can you understand the difference in the passing of Mr. Holmes what would be the difference in the decline or wearing out of *of* the organism and the wearing out and passing away from other injuries?

A. The more injuries produced to the organism of the system the sooner it will wear out.

Q. State what will be the condition in the case of Mr. Holmes.

A. If Mr. Holmes had never received the injury the probabilities is that he would be in better condition than he is still. We don't know what is before us: might have happened if he had not met with this accident.

Q. You are speaking of the probabilities?

A. He would have been in a better condition if he had not received the injury.

Q. You can't tell that, can you?

A. Only from the condition of the results.

Q. I am aware of results; but I will ask you a straight question.

A. I have been explaining as to any concussion of the immediate——

Q. Now you speak of probabilities. Now, Dr., we are all liable to a condition of probabilities to such as you refer?

A. Certainly.

Q. Respecting all specific injuries?

A. Yes, sir.

Q. Following up this idea, you say that Mr. Holmes is in a certain condition; you think in a worse condition than he would have been if such injuries had not occurred. You don't know anything of the injuries. Is your mind made up as to his condition? Is your testimony based on the condition as understood by you?

264 A. I have to take the history of the case from Mr. Holmes, and I took the symptoms that I found in some things. The mind has been injured; has been so previous to this time.

Q. Have you ever been deceived?

A. Of course, I have.

Q. Now, then, Doctor, is it possible for Mr. Holmes to have deceived you as to his real condition?

A. I don't think Holmes could possibly deceive me.

Q. Then, you think that he could not deceive you?

A. I can understand that he was not thinking—that he was not thinking of the result of the effect. He could not answer me so that *he* could not detect him. What Mr. Holmes told me I know he had no intention of deceiving me in some of the things.

Q. He might have deceived you in some?

A. He might have deceived himself.

Q. He might have done?

A. He might have tried.

Q. Do you understand that there is any distinction between the decline of the intellectual person and one who is not in the habit of using his mental faculties and a person who is in the habit of using his mental faculties?

A. Yes, sir; there is.

Q. The distinction between the one that is in the habit of using his faculties in a professional line and the one who is not in the habit of exercising his mind to that extent?

A. The hardest students are used up in the shortest time. The hardest students, those who are exercising their minds at all times, are generally short lived.

Q. I know that treats as to the general thing, those that study attentively from the books, the statistics now it is reported——

265 A. I know that doctors, as a usual thing, are short lived.

Q. That is the result of study—excessive study?

A. The doctor has a life of exposure and care constantly.

Q. Do you say that professionally?

A. Professional men don't use their mental faculties as they should; they are injured, generally, for a long life.

Q. Now, Doctor say that Mr. Holmes is a mechanic and is — carpenter, and is 56 years of age; was 53, four, or five when the accident occurred. I will ask you to state to what degree the injury as it concerns the mental ability of Mr. Holmes——

A. Well, taking Mr. Holmes, he was strong and in good health; he is in the evening of life. He is not so aged that his mind would be impaired a great deal by age.

Q. If the mind was not impaired by his age what degree of impairment was occasioned by the injury received?

A. I can't tell his exact condition before the injury of the brain and the spinal cord. I could not tell the degree it would be impaired.

Q. There is a fegree?

A. Certainly, there would be a degree.

Q. And there is a balance to be thrown over?

A. I could not tell.

Q. Now, Doctor, I will ask you if the habit of a person of the age of Mr. Holmes would have anything to do with the effect upon the intellect?

A. Certainly, it would.

Q. Suppose he was a drinking man, what effect would it have?

A. Produce an effect upon the brain.

Q. Would it have a tendency to irritate the injury received?

266 A. That would depend on the character received by Mr. Holmes?

Q. Would stimulants have a tendency to increase the injury? To what extent?

A. We use alcohol as a medicine.

Q. I am asking you what would be the result.

A. Of men using it as a beverage?

Q. That is what I referred to.

A. Of course, liquor as a treatment to any man who is using it for a beverage——

Q. Are you able to state to the court or jury that Mr. Holmes' brain is deprived of inability as a result of an injury received or whether it is the result of the excessive use of spirits?

A. I think it is from the injury received.

Q. Do you think it is from the result of the injury?

A. I base my opinion on the condition I found the patient in and the symptoms that present themselves.

Q. Can you tell what the symptoms are?

A. Yes; I can. I can tell from symptoms, to a great extent. Of course, I would call the history of the case in.

Q. Let's have the symptoms; go on.

A. I see no indications of Mr. Holmes being a dissipated man; but, so far as the question, *he* is the condition of the spinal cord and — has a prickling sensation, as if there was pins sticking in him.

Q. You know he was hurt in this way from what he told you?

A. I don't feel for him.

Q. You only know what others have told you?

A. No, sir.

Q. Give more symptoms. What is some of the symptoms? Tell me about the patient.

267 A. -nd I am able to tell him the other conditions. I find tenderness of the spine.

Q. What do you know of the tenderness of the spine? Except he told you, do you know anything of the tenderness except what he told you, Doctor?

A. Does not have to tell that; in passing my hand over the spine and if he touches the spine the patient lets me know.

Q. If you were to pass your hand over my spine and I should shrink, would you tell?

A. No, sir.

Q. Are these all the symptoms you can give?

A. That *t*has got through them all.

Q. Doctor, let me ask you if Mr. Holmes, in your judgement, now is capable of driving a team?

A. That depends upon the team that he would drive with one hand.

Q. Attending to business generally.

A. He—some kinds of business he could attend to, to have a team that he could drive with one hand.

Q. There is nothing in the impairments of intellect to prevent him from driving a team with one hand?

A. No, sir.

Q. Any team that would be gentle?

A. I don't know that he would get a six-mule team and drive along very well.

Q. Going back to the paralysis question of the left shoulder, will you state, if you please, if you know, to your knowledge, as to the position and cause of his appearance of paralysis?

A. I don't claim there is no paralysis there. I don't state there was paralysis there. I say there is anch*o*losis of that shoulder-joint. It may be from paralysis; it may be from inflammation. That symptom is not plain.

268 Q. Are there any symptoms outside, Doctor?

A. No, sir. It has been caused from paralysis. I would not state.

Q. Have you observed any particular stiffness in that shoulder-joint?

A. Yes, sir.

Q. Do you know how this was occasioned?

A. Not to my knowledge.

Q. Did you say there was anch*o*losis—stiffness of the joints—resulting to the injury?

A. Certainly.

Q. I will ask you, Doctor, as a professional, if this stiffness does not some*it*mes occur from rheumatic attacks?

A. Yes, sir.

Q. Does it not sometimes occur from non-use?

A. Yes. This would form an anch*o*losis from non-use. It is not very probable that it would be.

Q. Going back to the mental condition of Mr. Holmes, you seem to think that he is laboring under some difficulty. Will you state the origin of the difficulty that Mr. Homes is suffering at this time?

A. I can't do it.

Q. Do you treat mental diseases—brain diseases?

A. No, sir.

Q. You don't make that a specialty?

A. No, sir.

Q. Are — able to tell the court and jury the part of the intellect of Mr. Holmes that is affected?

A. It is in the region of the brain.

Q. Can't you tell whether or not his perceptive and his intellectual faculties or his will——

A. Well, the emotional faculties. I won't consider they are sound.

269 Q. What do you think about the perceptive faculties?

A. They may be injured. I am not sufficiently acquainted with him for his supposition as to how he was before injured to know about the intellectual tendencies, in referring to the perceptive faculties, so I could not say.

Q. I suppose you mean to state that he is not as bright as you have met. Do you pretend to state to the jury that the cause is to a great extent owing to the injury?

A. I judge of the mental, the appearance of the mind.

Q. You think that he is able to drive a team?

A. I think so.

Q. Is there any other labor that Mr. Holmes might do?

The counsel for plaintiff objects that this is not proper cross-examination.

Q. No other method that he might adopt?

A. There are others, I expect, if I was to think.

Redirect:

Q. Suppose a person was to drive a team, state whether or not motion of the wagon would not tend to irritate the plaintiff.

A. It would irritate the spinal cord.

Q. Would you advise a person in that condition to drive a team for a livelihood?

A. No, sir; not to make a teamster.

Q. Would you advise him to earn a living by that general means?

A. No, sir.

Q. Can you say from what you have found—explain how many years a person's life is usually shortened suffering from the complaint.

A. I can't tell; there is such a difference of opinion—an injury to the spinal cord from one to five years——

270 Q. Five years is the extent. State what the co-dition of the patient would be during the remainder of his life with reference to pain.

A. The patient would undoubtedly suffer from neuralgic pains of the head and in the shoulder. I think in the back—will suffer pains in the back.

Q. Describe what neuralgic pains are.

A. They are very acute; the weather might aggravate these pains, for instance, the changes of the weather.

Q. Might not these neuralgic be taken for rheumatic pains?

A. Well, neuralgic pains and rheumatic pains are something of the same nature, possibly they might be mistaken; the patient is suffering from neuralgic pains and not inflammation of the joint.

Q. You were interrogated by counsel in reference to symptoms which you have seen. Have you noticed the walk?

—. I have not noticed any defect in the walk.

Q. Have you paid any attention to it?

A. I have seen his walking on the street.

Q. Anything with reference to the condition he carries his body?

A. I think there is stiffness you might notice.

Q. You would look upon it as a symptom?

A. Yes, sir.

Q. What kind of a symptom?

A. I would call it a symptom of the condition of the spinal cord—an injury of the spinal cord.

Q. Had you examined as to the temperature—the health?

A. The left hand is usually cold down to the end of the fingers.

Q. What would be the condition of the right hand at the same time?

A. The right hand would be in a normal condition.

Q. Suppose, Doctor, the right arm and the left hand; what would that be the symptom of?

271 A. It is a symptom that there is nervous force and an impairment of the circulation; the circulation in the wrsit seems to be impaired and is all right in the arm. It has not the same degree of nervous force to warm the right hand up.

Q. That is the result of paralysis?

A. Yes, sir.

Q. What do you think the result was?

A. I think it is the result of the fall or the result of the shoulder joint; I am not sure about that.

Q. The incontinency of the urine—is that a symptom?

A. That is a symptom.

Q. Spmptom of what?

A. Spmptom of a concussion of the spine; also a symptom of the weakness of the nervous force of the parts.

Q. Do you think the patient will ever get well?

A. No, sir.

Q. State whether or not such pain would result from the accident.

A. Yes, sir; they are attributable to the accident.

272 McNaught: We now move the court for a nonsuit in this case. We desire to present authorities and points on this question which we think are new at this time.

After argument upon the motion for nonsuit by counsel for defendant and plaintiff the motion for nonsuit was denied by the court.

McNaught: We desire to preserve an exception to the ruling of the court denying the motion for nonsuit.

The Court: The exception will be allowed.

273 *Testimony Offered by the Defendant.*

MONDAY, *November 9th*, 1885.

GEORGE R. BLACKWELL, a witness for the defendant, being duly sworn, testified as follows:

(By Mr. MCNAUGHT:)

Q. State your full name.

A. George R. Blackwell.

Q. What is your business, Mr. Blackwell?

A. Locomotive engineer.

Q. How long have you been such?

A. I have been with this company a little over two years.

Q. Which company do you mean; Northern Pacific?

A. Yes; Northern Pacific Railroad Company.

Q. How long have you been engaged in railroading?

A. I commenced railroading for this company, for the Northern Pacific, the 10th of June, 1880.

Q. Are you acquainted with the Northern Pacific Railroad Company's switch-yards and grounds at Sprague, Lincoln county?

A. Yes, sir.

Q. How long have you been acquainted with these yards and their position?

A. I commenced in these yards when I commenced with the locomotive dep't, and that was a little over three years. I don't just exactly remember the date; it is between three and four years.

Q. Were you working for the company in the yard in the fall of 1883?

A. Yes, sir.

Q. Do you remember the circumstances of the collision between the switch-yard train and the team and carriage or buggy driven by Holmes?

274 A. Yes, sir.

Q. Who had charge of that switch-yard engine?

A. I was running the engine at that time.

Q. Who was your fireman?

A. Robert Johnson.

Q. I wish you would look at that diagram on the wall and state whether that is a correct diagram.

A. Yes; that is about correct. There has been some alterations *been* made since that was drawn.

Q. Some change in the track since?

A. There is more tracks now than represented on the diagram, but that is about the diagram or representation of the tracks at the time the accident occurred.

Q. State, Mr. Blackwell, just how that train was made up at the time that that accident occurred.

A. The engine was headed east, as it was in that diagram. This represents the engine, and we had a caboose behind the engine and three cars in front of the engine.

Q. What kind of cars were they?

A. One box car and two flat cars; that is my recollection about it.

Q. Now, just prior to the time you went east before reversing or running back at the time of the collision where were you with train and what were you doing?

A. Well, we came up and got these cars and came down.

Q. What track did you go up on?

A. We went up on this track, sir; this one in here. This was termed at that time the round-house track or track leading to the round-house or turn-table. This is a car and this is a car (indicating on diagram) and here is the machine-shop tracks, main
track leading to the machine shop, and here is another that
275 comes in here between the two shops. We came up in here
on what is called the crippled track and got these cars and took them down and got them here and we were in there on that track when an extra came in. She had nothing but an engine and caboose. They cut off the caboose on the main line.

Q. About where on the main line?

A. Below the crossing there; and their engine ran up on the round-house track, turn-table track, and we backed down with ou*t* train and coupled on the caboose. That is about how the caboose came to be behind the train.

Q. After you coupled on the caboose where did you —?

A. We came up in here, about where this train stands, with the intention of leaving the head car up in on the round-house track or turn-table track, and then we backed down and put the other cars on the crippled track.

Q. In here, Mr. Blackwell? Take this stick and point out on that diagram where the west end of that train — at the time when you stopped to throw off that car and just prior to running back at the time of the collision.

A. West end of the train?

Q. West end of the caboose.

A. It was in the vicinity of this switch. I could not tell exactly, but it was in that vicinity. We came up far enough to let this car clear this track. As the train stands on this diagram it does not clear the track. Secondly, we came up here and wanted to cut the head car off and leave it so that we could back down and come in on this track again. After cutting off this head car and backing down in order to let this car come in on this *the* track, and that is when, as near as I can remember when, the collision occurred.

276 Q. Where did your train stop at the time or after the collision?

A. The tank stopped on the crossing. This represents the tank here (indicating on diagram); stopped about on the crossing, and the caboose was just over the crossing.

Q. Where was your engine standing at that time?

A. It was standing just about right in here, about where the end of that caboose would be now.

Q. Or opposite that middle car?

A. Yes; just about that. That would throw the tender on the crossing.

Q. On the east end of the crossing?

A. Yes, sir.

Q. And what part of the caboose car on the planking?

A. Yes; the caboose did not quite clear the crossing; it stopped right down there. I could not tell exactly, but it was right—all the caboose was not on the crossing, but about the east end of the caboose rested on the crossing.

Q. Now, Mr. Blackwell, what is about the distance from the place where you stopped the train and reversed and run back to the place where you finally stopped, just at the time or after the collision?

A. I should judge that it is in the neighborhood of a hundred feet; somewhere near there. I don't know just exactly; somewhere about three car-lengths. It was in the neighborhood of one hundred feet. I could not state precisely.

Q. Well, do you think it was more than one hundred and forty feet?

A. I don't think it was.

Q. Suppose, Mr. Blackwell, that it was not greater than 140 feet
from the place where you stopped, reversed, and backed to
277 the place where your train finally stopped, and state what
rate of speed you could get up and stop and start the train
in that switch-yard at that time within that distance of one hundred and forty feet.

A. Well, that a good deal depends on the grade; depends a good deal upon the motion of your engine; some engines will get a greater rate of speed in that length of time than others. A person cannot state positively, but a person could not get up a very great rate of speed and stop and start in 140 feet, because it takes time to reverse her, and she does not get under motion for any great velocity of speed.

Q. What kind of an engine were you running on that day?

A. I was running a new engine; she was what we enginemen term a half-breed engine; it is engine 235.

Q. That is the number?

A. Yes, sir; she is a standard engine, standard freight engine.

Q. How long had she been in use?

A. She had never been in the service on the road. I was breaking her at the time. She was a bran-new engine.

Q. Well, what speed could you get up that day with that train, with four—three cars and your engine at that time and within that distance?

A. I do not think I could possibly get up more than six miles an hour.

Q. What speed were you running when you were running back?

A. I was not to exceed, I do not think, six miles an hour. I have since paid more strict attention to the momentations of the train and I have noted it. I have noticed that six miles an hour is as much as you could get in that distance.

278 Q. Well, how was it at the time your caboose reached the crossing of B street as to your rate of speed at that time?

A. Well, I was slowing down; was slowing down at the time the caboose struck B street.

Q. Why were you slowing down?

A. I had got a signal to stop from the head end of the train.

Q. From whom did you get that signal to stop?

A. From the yard master.

Q. You say that he was at the head end of the train?

A. He was at the head of the engine, but not at the head of the train.

Q. He was ahead of the engine?

A. Yes; he was ahead of me on the engine. I was looking east.

Q. He had given you a signal to stop?

ANDREWS: We object.

Q. Just when was that signal given to stop?

A. The caboose was not quite on the crossing at the time I got the signal. The train was in just about a car-length down from where the engine was—about a car-length down from where she stopped. Now, that would throw the engine just about in here (indicating), about that switch.

Q. Did you notice where the yard master was when you started to run west at that time, before the collision occurred?

A. The yard master was coming up, walking east.

Q. From where?

A. From the crossing.

Q. From the crossing?

A. From the crossing, walking east. I got a signal to back up from the yardman, and received a signal to stop from the yard master.

279 Q. You say he was walking east. From what point was he walking?

A. When I noticed him he passed right along by the engine on the right-hand side looking east. I don't know where he was standing previous to that time, but he came up on this line here. I received a signal from him here to back up, and when I backed up he was walking this way. I passed him and he gave me a signal to stop, to slow down, and before I could stop, just about the time he passed me—the engine was hardly past him—he gave me a signal to stop—just a common signal to stop. I reversed my engine to stop.

Q. What knowledge, if any, at that time, did you have that there was any danger of collision?

A. I did not, sir.

Q. You had no knowledge?

A. No, sir.

Q. Did you state about how fast that train was moving at the time you reached the crossing?

A. Did I state?

Q. Yes, sir.

A. I don't know that I did.

Q. About how fast was it moving at that time, do you think?

A. She was very near stopped because she did not get far; she did not get but a few feet.

Q. About how fast was she moving?

A. I should judge about two—to use a railroad term, I should judge in the neighborhood of two miles an hour.

Q. State, Mr. Blackwell, whether or not during the time you were backing that train from the place where you started, as you have described, some 100 feet or more east of the crossing down to the time the collision occurred, what was being done, if anything, to the bell.

280 ANDREWS: There is no testimony so far that the witness paid any attention to the bell.

The COURT: Objection overruled.

Q. Did you pay any attention- at the time when you were backing- to the bell?

A. The bell was ringing.

Q. From what point to what point was the bell ringing?

A. Ringing all the time; was ringing constantly all the time.

Q. What do you mean by that?

A. Constant, continually ringing.

Q. From what points, from the time you started to back until she stopped?

A. Well, I don't know that I understand you in regard to that.

Q. You say that your train when you started to back was along up here some place?

A. Yes, sir.

Q. She run down until part of the caboose passed over the crossing?

A. Yes, sir.

Q. Now, was the bell ringing from this point, wherever she was standing, all the time to where she stopped?

ANDREWS: We object; it is leading.

A. Yes, sir.

Q. Who was ringing the bell?

A. The fireman.

Q. Who was your fireman?

A. Robert Johnson.

Q. How do you know that he was ringing the bell at that time?

A. I seen him ringing the bell.

Q. How far was you from him?

A. About five feet, the width of the cab—not five feet, seven feet. The cab is seven feet wide. 281

Q. Where was he at that time?

A. He was on the left-hand side of the cab.

Q. Inside of the cab or outside?

A. Inside.

Q. About what distance, Mr. Blackwell, with that train running back as that train was running back at that time on that day, could the rumbling of the train be heard?

Andrews: We object. There is no evidence that Blackwell ever heard that train; his business is not such as to lead him to any observations of that kind.

The Court: Do you wish to lay a predicate?

Q. Have you ever made any observations how far you could hear the rumbling noise of the train?

A. No, I have not particularly. I never paid any particular attention, because as a rule I have always been on the train. Of course, if you are standing in the station or in the street at Sprague on a day like this you can hear the train coming around the lakes for several miles. Other days you cannot hear it until it approaches in sight.

Q. Depends on the atmosphere?

A. Yes, sir; a great deal.

Q. How was the atmosphere that day?

A. If I remember right, it was a clear day. I would not say positive, but I think that it was a clear day.

Q. Have you made observations enough to form an idea or know about how far the rumbling of those yard trains can be heard?

282 A. No, I cannot say that I have made any particular observations of them, but then——

Andrews: We object to his answering the question.

A. You cannot estimate any particular distance. Some days it can be heard further than others, and it is a good deal owing to the condition of the track and condition of the cars. Some cars will come down the track and make a great deal of noise; probably have a flat spot on the wheel that you can hear every time it comes over—you can hear it strike. Sometimes the track is not in condition, such as low joints or high joints in the rails, and it makes more rattling of the machinery and car than it would if it was a smooth track and the wheels in good condition.

Q. Are there any frogs to cross over as the train was backing that day?

A. Yes, sir.

Q. What effect, if any, would that have upon the rumbling noise?

A. That had the effect of sharpening the noise; kind of *k*linking sound whenever they cross over the switch.

Q. Do they in crossing diminish the noise of the train?

A. They have a tendency to increase it.

Q. Now, I do not ask you to state the exact distance you could hear it. State as near as you can about how far the switch-train, running as switch-trains run in that yard, can be heard, say the train is in good condition.

Andrews: We object. He has laid no predicate.

The Court: I think the proper way to do is to let him tell what he knows.

A. In my opinion—of course, different men have different opinions about such things—but in my opinion——

283 ANDREWS: We object.

The COURT: I will rule out the opinion. That is common matter of observation by everybody.

McNAUGHT: They might not have an impression as to distance.

The COURT: I do not think that is a matter he can testify to as an expert. I think that he can tell the facts as to the noise made by the train and let the jury judge how far it can be heard.

McNAUGHT: We will except, if your honor please.

Exception allowed.

Q. How many frogs did you pass over running that train back that day to the place of the collision?

A. Only run over one.

Q. That is, with your engine?

A. Yes, sir.

Q. Until it reached the crossing?

A. Yes, sir.

Q. Each car, of course, would pass over that one?

A. These cars ahead of the engine would be about—only one would pass over that frog. There would be the engine, one car and the tender. Of course, the engine and tender are two separate pieces of machinery.

The COURT: We will take our noon recess now.

284 *Afternoon Session.*

Continuation of examination of BLACKWELL:

Q. Did you notice anything about the box cars that were on the side track, next the freight-depot building, at the time of this collision?

A. Yes; there were some cars there, I believe. They were unloading freight.

Q. Do you remember how many box cars there were?

A. I think there was three cars. I think that is what was there; three or four.

Q. Do you remember where the west end of the west car—about where it was as compared with the planking crossing?

A. I cannot state positively as to where it was standing. I was not handling those cars and I did not notice exactly the position—whether standing on the crossing or off the crossing. I think they were unloading freight there at the time.

Q. Unloading freight from these cars?

ANDREWS: We object.

A. Yes, sir.

Q. How is it that as to the usual place where they handle and unload freight?

A. Yes; I believe that was the only freight-house that the company had at that place at that time. That is where they usually stood. There is three doors in the freight-house. I believe it contains three cars to unload at once.

Q. How far west of the crossing where the collision occurred, if at all, did then the switch-yard of the company extend?

A. It extended—there has been so many changes since, I
can hardly place the west end of the switch-yard, but I should
285 judge that it ran past the freight-house down there about
somewhere in the neighborhood of three hundred — east
that crossing.

Q. About how frequently during that season of the year did trains—switch-trains and other trains—pass over that place where the collision occurred?

Andrews: We object. Our objection is based on the ground that the defendant had no right to use this yard in such a way as to practically obstruct a public highway.

The **Court**: I will overrule the objection.

Andrews: I think we will take an exception, if your honor please.

Q. State about how often switch-trains at that time and prior thereto had been in the habit of passing over that place.

A. Well, at that time they were passing over very frequently and passing up and down, switching backward and forwards; also trains pulling out for their destination and pulling in.

Andrews: That is not in response to the question.

The **Court**: I will not rule it out. I think it pertinent.

Q. Go on.

A. It was used for switching and making up trains and they had to pass over this crossing.

Q. About how many times a day would trains—regular, special, and switch-trains—pass over this place?

Andrews: We object.

The **Court**: On what grounds?

Andrews: We are only inquiring with reference to switch-trains. There is no question raised as to plaintiff's negligence in not looking for regular trains—freight trains. It is the irregular trains.

The **Court**: Was not the last question of counsel directed to switch-trains?

286 **McNaught**: I think the number of trains, regular or irregular, would have some tendency.

The **Court**: The objection is overruled.

Andrews: We will ask an exception.

A. Well, it is hard for me to state exactly the number of trains. Some days there would be more trains than others. Some trains would cause more switching than others; cause more switching to be done in the yard than others. Sometimes there would be more through freight and sometimes there would be more local freight, and it would be hard to estimate; it would be multiplied up into the hundred of times crossing that crossing a day.

Q. Then you think the crossings there would run up into the hundreds?

ANDREWS: We object.
The COURT: It is following the answer he has already given.

A. Yes, sir.

ANDREWS: Has he a right to do that?
The COURT: That is not liable to the objection that it is leading.

Q. How was it as to having regular times for running switch-trains; did they run it regular or at all times?
A. All times; had no regular time for switch-engines.
Q. Were you acquainted with Holmes at that time?
—. I was not, sir.
Q. Where were you upon yesterday, Mr. Blackwell, during the day?
A. Yesterday?
Q. Were you at Sprague during the day?
A. Yes; I left Sprague and returned to Sprague.
Q. What did you do at Sprague, if anything, about handling a train in the switch-yard?
287 A. I was handling a train in the switch-yard.
Q. What kind of a train was that?
A. Supposed to be a switch-train at that time.
Q. How was it made up?
A. It was made up with an engine, tender, caboose behind the tender, two flat cars, and a box car.
Q. Which end of the train was the caboose on?
A. On the west end.
Q. Where was your engine?
A. The engine was east of the caboose
Q. Where were your flat cars?
A. East of the engine.
Q. And your box car?
A. Yes; east.
Q. Of the flat cars?
A. Yes; two flat cars.
Q. Will you show the jury what track you placed that train upon yesterday, if any, upon that diagram?
A. We came up into this track as represented on this diagram, and came up into here and backed down and left this head car so that it would clear this track (indicating).
Q. Now, do you know whether any observations were made when you were standing there by other people?
A. Yes; I believe there was. To the best of my knowledge I could see men making observations and measurements, &c.
Q. Where did you move your train to, if at all, after observations were made where your train was standing in this position?
A. We moved it back down in here (indicating).

288 Q. Well, were there any observations taken while down at that point?

A. Yes; I believe there was.

Q. How did the train that you had in there yesterday compare with the train you had at the time of the collision with Holmes?

A. It was about the same train; the same number of cars; same class of cars.

Q. How was it as to the height of the caboose and engine?

A. Yes, sir.

Q. How was it; the same or not?

A. About the same. I do not think there was any comparative difference. There is no comparative difference in the height of the engine, and the same caboose was used then as they are now, and now as they were then.

Q. Same height and same kind?

A. Same class of caboose.

289 Cross-examination.

(By Mr. ANDREWS:)

Q. How long had you been at work for the defendant as a railroad engineer at the time of the accident?

A. At the time the accident occurred?

Q. Yes, sir.

A. As a railroad engineer?

Q. Locomotive engineer is a better term.

A. I think it was about two months that I had been running, as near as I can tell.

Q. Is that the first work you ever did as a locomotive engineer?

A. No, sir.

Q. You have worked in other places, have you?

A. Yes, sir.

Q. What date was it this accident occurred?

A. It was on or about the first of November, 1883.

Q. Did you make a return to the company as to the time?

A. What do you have reference to in returning?

Q. Did you make a statement to the company as to the accident having occurred?

A. I believe I did.

Q. What day did you return?

A. Have you got this casualty report of mine. Is it here or at St. Paul? Is it here or has it been sent back. I have not seen the report for a long time. It is the duty of every one concerned in an accident to make out a report concerning it. It is put in the office. They do not hold possession of it.

Q. So you simply did your duty in making a report that an accident had occurred?

A. Yes, sir.

290 Q. Do you remember what date you returned to the company that accident occurred on?

A. No; I cannot say positively.

Q. What is your recollection?

A. It was in the fore part of November; exactly the time I returned the casualty in I could not state positive.

Q. Did you testify on the former trial, Mr. Blackwell?

A. I think I did.

Q. Did you not testify at that time that the accident occurred on the first of November?

A. I might possibly.

Q. If you testified your testimony was correct?

A. As near as I can tell it was on the first or thereabouts. I would not say positive now, but I guess my testimony will prove it. It is there some place.

Q. Did you so testify on the other occasion?

McNaught: He said he could not remember now.

A. You ought to know whether I did or not.

Q. I do know. (Testimony handed witness.)

A. I did, sir.

Q. What is the length, Mr. Blackwell, of a locomotive and tender, such a one as you had in the yard at that time?

A. Fifty-three feet. What do you include in the dimensions of the engine and tender?

Q. I don't know anything about it except the engine and tender.

A. There is a pilot; I suppose you include the whole business.

Q. Is the pilot included—that is, from extremity to extremity is fifty-three feet?

A. That class of engines running at that time.

Q. That was the probable length of that locomotive?

291 A. Yes; that was the exact length of it.

Q. Do you know whether or not there is a grade along that line of that road?

A. There is a grade there. The extent of the grade I don't know.

Q. Do you know whether cars will run down that grade if the brake is taken off?

A. They will not.

Q. Have you ever tried it?

A. We have to give them all a start.

Q. Will they keep under way when they start?

A. Yes, sir.

Q. Will they gather way?

A. Well, let me see. I don't know exactly. They won't gather headway that I know of. They will go along very slow. So in starting a car they go up with the engine and couple on and give it a start, and, without giving steam to the engine, let the car run down of its own part. It does not materially gain any speed.

Q. Does not lose anything?

A. No, sir; it does not lose anything; keeps up that momentum.

Q. Now, will a train make the same noise going down grade at the same speed as an up grade?

A. I could not hardly tell you.

Q. You never made any observations?

A. I never made any observations whether it made any more noise running up grade than down.

Q. Does it not make some difference with the noise made by a train whether or not they are using steam on the locomotive?

A. If an engine is working hard to be sure the engine will make more noise.

292 Q. Does not that necessarily cause pounding?

A. Well, it should not by any means. If there is a good engineer there is little pounding by the engine.

Q. Won't the engine pound?

A. They do not as a rule. Sometimes they do and sometimes they don't.

The COURT: What do you mean by pounding?

ANDREWS: There is a great many definitions of pounding. What I mean in this instance was the force of the engine upon the track.

A. Well, do you mean that the engine jumps up, pounds the track?

Q. Who was it gave you the signal to move ahead? Who gave the signal to move back?

A. The brakeman.

Q. Who was that brakeman?

A. I think his name was Taylor.

Q. Where was he standing?

A. He was standing up at the upper end of this train, at the east end of the train.

Q. That was your signal to back up?

A. Yes, sir.

Q. Who gave the signal to stop?

A. Mr. Romick.

Q. Was that a signal to slow up or stop?

A. Stop.

Q. Signal to stop suddenly or easily?

A. No, sir.

Q. It is not a signal to stop?

A. It was not violent to stop.

Q. How far ahead of you was he when he gave you that signal?

293 A. He was about ahead of the engine. He was in the neighborhood of twenty-eight feet. The engine was thirty-three feet long.

Q. Where did you say the frog was on which so much noise might have been made? Point on the map where the frog was.

A. There is the frog.

Q. At what rate of speed was the train moving when passing over that frog.

A. Between four and six miles an hour. It was after I had reversed. The caboose would probably be standing on that when the train would start, standing in the neighborhood of that switch. The train did not move but a short distance.

Q. You said the cars were unloading freight at that freight-house; do you know whether or not the west-end car was being unloaded?

A. I don't know positively.

Q. You have no opinion at all with reference to that?

A. We had set cars in there to be unloaded with freight.

Q. That is all you know about it?

A. Yes; I did not take any of the freight out myself.

Q. You don't know at the time the accident occurred that any freight had been or was being taken out of that car — the further end of the track?

A. I did not take it out myself.

Q. Do you know?

A. Oh, I cannot state as the man who was handling it.

Q. Then you have no information yourself?

A. No, sir; I did not take it out myself with my own hands.

Q. You did not see anybody else unload freight from that car?

A. Yes, sir.

Q. At that time?

294 A. Not right at that minute.

Q. Or at any time before that?

A. Previous to that I saw Mr. Slater.

Q. Unload freight from that very car?

A. Not exactly from this; he was unloading.

Q. What was he unloading?

A. From these cars. I don't know positively which one it was now, but it was one of those cars.

McNaught: I desire to ask one question that I omitted.

Q. Were you using air on your engine at that time?

A. No, sir; the engine did not have any air.

Q. How was it as to having air on most engines then?

A. It was not customary; only on the incline engines on Snake river.

Q. You stated that this was a new engine?

A. Yes, sir.

Q. Had the apparatus for air been put on the engine?

A. No, sir.

Q. How long had it been in use?

A. It had not been in service on the main line. She was a brannew engine. She was put in the yard, breaking her in.

Cross-examination.

(By Mr. Andrews:)

Q. There is a question I forgot to ask you. You say that the bell was ringing on this occasion?

A. Yes, sir.

Q. Did you ever have any conversation with Mr. Holmes about that?

A. Not materially I did not; not to amount to anything.

Q. Did you not say to Mr. Holmes in his cabin in Sprague, about

ten to twelve days after the accident occurred, in the presence
295 of your brother-in-law and one other person, your father-in-law, that the bell of this locomotive was not rung?

A. No, sir; I never told Mr. Holmes such words. Mr. Holmes is badly mistaken about that.

Q. Did you not say to Mr. T. S. Rodman, in the town of Sprague, that the bell was not ringing or words to that effect?

A. No, sir; I am swearing to what is the truth.

Q. Then you have made statements on the outside that the bell was not ringing?

A. They were talking to me and trying to pick out of me that that bell was not ringing long before the suit ever came up—before I ever knew there was going to be a suit about it.

Q. What you say is that what you said on the outside you did not swear to?

A. No, sir.

Q. What you swore to here you swear to?

A. Yes; that bell was ringing.

296 ARCHIE A. WISHARD, a witness on behalf of defendant, being duly sworn, on oath says:

(By Mr. McNAUGHT:)

Q. State your full name.

A. Archie A. Wishard.

Q. What was your occupation?

A. Locomotive engineer.

Q. How long have you been in the railroad business?

A. About six years altogether—that is, firing and running.

Q. In whose employ are you at this time?

A. The Northern Pacific—that is, I have done the last work for them. The last work I did was for them.

Q. Where were you upon yesterday—Sunday?

A. In Sprague.

Q. Did you make any measurements—take any observations—yesterday at that place?

A. Yes, sir; I did.

Q. At whose request?

A. Well, I don't know who spoke of it first. I was with Mr. Weymouth.

Q. Either Mr. Weymouth or myself, was it?

A. I don't know who spoke of it first. It was either yourself or Mr. Weymouth.

Q. Now, look at this diagram here and see whether you recognize that as the location there at Sprague.

A. Yes, sir.

Q. Now, explain to the jury where the train—saying this is the train caboose on the west end, the engine here, two flat cars and one box car, these three box cars in here—state first how these box cars were located as to whether or not the west end impinged over the end of the planking when these observations were made yesterday.

297 A. Not on this planking that extended across the track; the planking for the crossing the cars did not touch; this planking on the freight-house the cars were on.

Q. Did or did not the west end of the box car extend down to or a little over the planking?

A. Over the apron or slip, and then it extended about one foot west of the slip or apron, the incline from the freight platform down.

Q. When the first observations were taken where was the train?

A. 140 feet was the first from the caboose to the center of the crossing.

Q. Then this train was 140 feet east up the track when these observations were taken from the rear end of the caboose to the center of this crossing?

A. Yes, sir.

Q. Now, what observations were taken while the train was in that position?

A. Well, I was on this street and crossed the crossing several times; also made some measurements.

Q. How did you cross the street and where did you go from?

A. I went from——

ANDREWS: I object. I do not remember any testimony so far to the effect that the cars along that track were in the same position as at the time of the accident. The condition of these things must have been exactly the same then as now in order that these experiments be of any value to the jury.

THE COURT: That is doubtless true, unless counsel are prepared to show that the situation is the same.

MCNAUGHT: We are prepared to show that it is so near the same that it cannot make any difference whatever.

298 Q. Well, how did you go around here in making these observations? What did you travel in?

A. I traveled in a buggy and on foot, too.

Q. Traveled in a buggy. What was the height of the buggy seat above the ground?

A. Four feet six inches.

Q. Now, where did you go? Point out on this diagram. Here is the block up along here; point out where White's saloon is.

A. We went up as far as the end of the street there, turned, and came back along there by the National hotel and White's saloon, along this street.

Q. Drove around to the crossing?

A. Yes; we crossed here.

Q. Now, when the train was up in this position, 140 feet east of the center part of this crossing, from what points as you came along down here could you see that train?

A. Well, along here we could see until about here (indicating); then it came in sight again and we could see the top of the train and engine over these cars here; over these cars from the hill. We saw the train until we got in this sag near the crossing, and then they were out of sight until we came near the platform; then we got sight of the end of the caboose.

Q. Do you remember how far or did you measure to see how far from the north rail of that track where the collision occurred, or said to have occurred, you could see the train past the end of that box car?

A. Yes; I took three measurements there.

Q. What were they? What did they result in?

299 A. There was one measurement we saw the top of the car was forty feet from this track here; looking at the end of the car past this car was 15 feet. When the train was 140 feet from the crossing it was 15 feet, and at 70 feet it was 22 feet that we could see—22 feet away.

Q. When the train was up 70 feet—that is, up on the rear end of that caboose car was 70 feet east of the crossing—then you could see 22 feet—when you were within 22 feet of the track?

A. Of the rail; yes, sir.

Q. Now, did you make any observations as to where you could see it from coming from White's down in the buggy before you got to the planking, when the train was 70 feet up from the crossing?

A. We saw it over these cars until within 40 feet. There was a sag there, and we could not see it. We measured from this here when we lost sight of the top of the train.

Q. Then you could see the train all the time coming down from White's place?

A. When the train was 70 feet.

Q. Until you were within 40 feet of the track?

A. Yes, sir.

Q. Then, when you got here again—that is, 22 feet of the track—you could see the train again?

A. Yes, sir; the caboose came in sight around the end of the car; before we were looking over this car.

Q. Then, there is a space in there, according to your measurements, of 18 feet. When the train was up here 70 feet there was a space in here of 18 feet?

The COURT: That is leading and mere deduction.

Q. That last observation. When the train was 70 feet up there what kind of a vehicle was it you took your observation from?

300 A. Buggy and foot as well.

Q. What was the height of that buggy? Same as you mentioned before?

A. Yes, sir; four feet six inches.

Q. Up to the top of the seat, did you measure that yourself?

A. Yes, sir.

Q. Did you take any measurements there, Mr. Wishard, to see what was the distance from the seat where you were sitting in the buggy to the head of the horses?

A. Not exactly to the head of the horses. We measured something about the length of the team, but I don't remember from the seat. I did not take that measurement.

Q. When these measurements were being made yesterday, what time was it when they were made?

A. It was about 11 o'clock—between 11 and 12 in the forenoon.

Q. Were there many people there?

A. Yes, sir.

Andrews: We object.

Q. About how many people were present when these measurements were made?

The Court: What has that to do with it?

McNaught: It has a bearing to show if there is any mistake or anything of that kind that there is plenty of people these gentlemen can bring here to show them.

The Court: I do not think it is material.

Q. It was about 11 o'clock in the forenoon of the day yesterday?

A. Forenoon; something near 11 o'clock.

Q. Well, Mr. Wishard, will you state about what rate of speed you can get on a train consisting of caboose, engine, two flat cars, and a box car in a distance of 140 feet, both starting and stopping in that distance.

301 A. Well,-ith an ordinary engine, a good rail, a man might possible attain five miles an hour, starting and stopping in this distance of 140 feet. All engines are not alike and all trains are not alike, but with an average train and engine and a fair rail you can get at it.

Q. A rate of five miles an hour?

A. Yes, sir.

Q. Mr. Wishard, with a train running five miles an hour, on a calm day, composed of cars I have mentioned, a caboose car, two flat cars, and a box car I have mentioned, passing over a frog, about how far could that train be heard?

Andrews: We object.

The Court: I have ruled upon that objection. I will sustain the objection.

McNaught: We will except.

The Court: Very well.

Exception allowed.

McNaught: We think they have proven enough on that themselves, and we will ask no further questions concerning it.

Cross-examination.

(By Mr. Andrews:)

Q. Did you ever experiment to see how great a speed you could attain in starting and stopping a train like the one in question in 140 feet?

A. No, sir.

Q. This is simply an opinion of yours based upon your experience in locomotive engineering?

A. As a switchman; I have switched a great deal; did more switching than anything else.

302 Q. What rate of speed can a locomotive, such a one as has been testified to here, and train, such a one as has been shown here, attain in 140 feet over an ordinarily good track, down grade, say 40 feet to the mile?

A. Without stopping?

Q. Without stopping in 140 feet, could such a train attain?

A. It would be owing to the smartness of the engine.

Q. Some engines are more logy?

A. Yes; the motion makes a great difference in engines. Some engines are very quick and others very slow.

Q. Do you know the engine with which the collision occurred?

A. I know the class of engine.

Q. As a class of engine are they logy or quick to start?

A. Well, they are an average engine. That class of engine is an average between the Baldwin and Portland, what we call a half-breed engine.

Q. Do you know the kind of engine?

A. Yes.

Q. With a half-breed engine and such a train as has been testified to here, what speed would such a locomotive attain in traveling 140 feet down grade of 40 feet to the mile?

A. Well, it would attain about six or six and a half miles an hour.

Q. Could it not attain a greater rate than that?

A. N*ow* over six and a half, I do not think. I never experimented, but I don't think it could be done over six and a half, 40 feet. I never was on a grade of that kind, switching.

Q. Do you know what the grade at Sprague is?

A. I switched there a good while.

303 Q. Do you know in figures what the grade is?

A. No, sir.

Q. You know there is a grade there?

A. Yes, sir.

Q. Is that grade sufficient for cars to start whenever the brake is taken from them?

A. No, sir; there have been cars started from certain parts of the yard.

Q. That is not along this track?

A. They will after they get started, after they get about there (indicating), but here it is too level. Down about there cars will roll easily after starting.

304 **Luther Winnie**, a witness for the defendant, being duly sworn, testified as follows:

(By **McNaught**:)

Q. What is your full name?

A. L. M. Winnie—Luther Winnie.

Q. Where do you reside?

A. In Sprague.

Q. What is your business?

A. Running Sprague yards; railroading at present.

Q. What is your official position?

A. Yardmaster.

Q. At Sprague? How long have you been employed in that yard?

A. Three years the fourth of last March.

Q. Do you know anything about the collision between a switch-train in Sprague yard and a carriage driven by Holmes here?

A. Yes, a little.

Q. Look at that yard there, Mr. Winnie, and see if it is a representation of the yard as it was at that time—freight depot, box cars, road crossing, etc.

A. I think that is about it, sir.

Q. Where were you when the collision occurred?

A. Opposite the post office.

Q. Where?

A. The post office is right here. I was north of the post office, about here.

Q. What did you first observe as you were coming up at that time?

A. No more than the train struck the wheels of Holmes' buggy.

Q. About where was Holmes when you first saw him?

A. I did not see Mr. Holmes until after it struck him.

305 Q. About how far west did the train move—that is, over the crossing, if at all, after the collision?

A. It did not move over the crossing at all. The caboose went to the west end of the crossing.

Q. About what rate of speed was the train moving at that time—at the time of the collision and just before?

A. Four miles an hour.

Q. Did you observe any box cars on the side track next the freight depot before?

A. Yes, sir.

Q. How many were there?

A. Three.

Q. Did you observe the location of these box cars at that time to know whether they impinged upon the planking on the crossing or not—whether they extended over this planking or down near to it?

A. They were about eight feet from this crossing.

Q. East of it?

A. East of this crossing.

Q. Do you know about how the ground was in here at that time, between White's saloon and the place of this crossing—how it laid as compared with its present condition?

A. I could not say; I do not remember.

Q. How as to the planking out at this point—as to its being in the condition now that it was then?

A. Now it is filled in at the northwest corner more than it was then; there was a raise there.

Q. Do you know how much it was filed in at that crossing?

A. Oh, I should judge a foot.

306 Q. Now, how is — at this point out here where this track is as to the ground as compared with the ground at that time; there is a track running in here now, I believe, is there not?

A. Yes, sir.

Q. Do you remember whether that track was used then, constructed or being constructed at that time, or not?

A. There was no track there on the north side of the depot.

Q. D- you know what they were doing there at that time, whether doing anything towards constructing it?

A. I think not.

Q. Do you remember?

A. No, sir.

Q. Did you notice how that train that collided with Mr. Holmes' wagon was made up, Mr. Winnie?

A. Yes, sir.

Q. State how.

A. There was a caboose behind the engine, two flats, and a box car ahead of it.

Q. Which end of the train was the caboose on?

A. The west end of the engine.

Q. Were you in Sprague upon yesterday?

A. Yes, sir.

Q. Did you observe any observations taken there at that time?

A. Yes, sir.

Q. You saw the train made up yesterday as compared with the train collided with Holmes' wagon?

A. Just the same way.

Q. As to the grade of the road, Mr. Winnie, where these tracks are—has that grade been changed since the time of the collision?

A. The fall of the ground from the shops down?

Q. Yes, sir.

307 A. No, sir; I think not.

Cross-examination.

(By Mr. ANDREWS:)

Q. Do you know what grade there is along the line of that road?

A. No, sir; I do not.

Q. Do you know whether or not there is any grade?

A. There is a grade.

Q. Is that grade sufficient to start cars itself when the brake is taken off?

A. Yes, sir.

Q. I do not quite understand your statement relating to the box car there on the side track; the car that I refer to is that on the west end. Where was the west end of that box car with reference to the planking?

A. About eight feet from the east end of the crossing.

Q. Which way?

A. This way (indicating).

Q. So that there was eight feet between the planking and the west end of the box car—that is what you mean to say?

A. Yes, sir.

Q. Mr. Winnie, have you ever spoken with any one else and made a different statement of your knowledge of this affair?

A. I don't know. I don't think I did.

Q. Did you ever tell anybody that you did not see the transaction?

McNaught: We object unless it is made more definite.

The Court: I think it is competent to ask that question.

Q. Did you ever say to any one that you were in bed or asleep at the time of the accident?

308 A. Yes, sir.

Q. To whom did you say it?

A. I told Holmes and I told Roadman so.

Redirect examination.

(By Mr. McNaught:)

Q. Why did you make that statement to them?

A. Simply because I did not want to come to court and another one was I did not want to appear against Holmes.

309 David Vinyard, a witness for the defendant, being duly sworn, testified as follows:

(By Mr. McNaught:)

Q. Where do you reside?

A. In Sprague.

Q. What is your business?

A. I am in the draying business.

Q. How long have you resided there in Sprague.

A. A little over five years.

Q. Did you ever witness a collision, Mr. Vinyard, between the trains of the defendant in the switch-yard of the Northern Pacific Railroad Co., at Sprague, and a buggy driven by Mr. Holmes?

A. Yes, sir.

Q. Look at the diagram there, Mr. Vinyard, and point out about where you were at the time, suppose this to be the freight depot, crossing, side tracks, &c.

A. This is the post-office crossing?

Q. Yes, sir.

A. I was about in here, along there (indicating on diagram).

Q. Did you observe the train as it was backing down towards the crossing?

A. Yes, sir.

Q. How long did you continue to observe it with reference to the time of the collision up to the time of the collision?

A. Yes; I noticed the train as I turned the corner; I came through this alley between the livery stable and the saloon, and of course I noticed the train as I turned the corner here by the saloon; I was about here; I noticed it as quick as I came out.

310 Q. Did you observe at that time, Mr. Vinyard, as the train was backing, whether the bell of that engine was ringing?

A. Yes, sir.

Q. Was it ringing.

A. Yes; it was.

Q. Did it continue to ring up to the time of the collision with Holmes' wagon or buggy?

A. Yes; it rang until the engine stopped.

Q. Where were you going, if any place, at that time?

A. Going to the freight depot.

Q. What did you do after that, if anything?

A. I drove down next to where Holmes was taken to and stopped and went in to see who it was, and then got in my wagon and drove across to the freight-house to get another load.

Q. Who, if anybody, was delivering freight there at that time?

A. Mr. Slater.

Q. Mr. Vinyard, did you ever take any observations to see whether or not when box cars are standing as these box cars are marked there on that diagram, for instance, adjacent to the depot and the caboose car and engine coming down on this side of the tracks, did you ever take any observations to see whether the smokestack of the engine or top of the caboose can be seen by a person driving along in a vehicle over the tops of the box cars.

A. I can see it from my seat on my wagon.

ANDREWS: We move to strike out the answer.
The COURT: The answer is stricken out.
MCNAUGHT: We will save an objection.

Q. Do you remember about the height of the seat of your wagon?

A. I think it is six feet. I won't be positive. I won't be
311 positive as to the height of it.

Cross-examination.

(By Mr. ANDREWS:)

Q. Do you remember the day of the month this accident occurred?

A. No, sir.

Q. You say say you were on a truck?

McNaught: He did not say so.

A. Truck; yes.
Q. Whose truck was that you were driving?
A. Belonged to myself and Tom Smith.
Q. Where did you get it?
A. Bought it there, in Sprague.
Q. Sheriff's sale?
A. Yes, sir.
Q. At what sheriff's sale?
A. Sale of E. Silver.
Q. Fairweather and Brook?
A. No; W. H. Marshall *vs.* E. Silver.
Q. Then this collision, Mr. Vinyard, was after that sale?
A. Yes, sir; it was.

312 M. Maloney, a witness for defendant, being duly sworn, testified as follows:

Questions by Mr. McNaught:

Q. Where do you reside?
A. In Sprague.
Q. How long have you resided in Sprague?
A. It will be about five years now.
Q. What official position, if any, do you hold, Mr. Maloney, in that county?
A. Deputy sheriff.
Q. Are you acquainted with the freight depot of the Northern Pacific Railroad Company and the crossing there, and the railroad company's switching yard at Sprague?
A. Yes, sir.
Q. How long have you been acquainted with the locati-n there in that yard?
A. Well, constantly for four years, in the neighborhood of that now. It will be four years in June next since I have resided in Sprague constantly.
Q. W-re you in Sprague upon yesterday?
A. I was, sir.
Q. Did you make any observations there and take any measurements there upon yesterday?
A. Yes, sir; I did.
Q. At whose request?
A. At Mr. Weymouth's request.
Q. Who is Mr. Weymouth?
A. He is superintendent of this division.
Q. Of the railroad?
313 A. Yes, sir; of the railroad.
Q. Now, just look at that diagram (referring to def-ndant's diagram) and see if this is a diagram of the crossing, freight depot, and switching yard.

A. That is a correct diagram; that is the crossing.

Q. Now, state what observations you made there yesterday and where the train was, if any, that was made up there when these observations were made.

A. The train stood about where these box cars are (indicating on diagram). They stood on this track here and the train stood *v*ack here about seventy feet on this crossing.

Q. From the crossing?

A. Yes; and at Mr. Weymouth's request I got into a buggy and drove around and took observations coming onto this crossing.

Q. Did you measure the height of the buggy that you got into—the height of the top of the cushions?

A. Yes, sir.

Q. What was that height?

A. Four feet six inches. Two cushions on top of the cushion in the buggy. The top of these extra cushions——

Q. Made four feet six inches high from the ground?

A. Yes, sir.

Q. In taking these observations where did you go?

A. I drove down on the south side of Railroad avenue, crossed, and came back on the north side, coming down across the crossing on "B" street.

Q. Did you come past what is called White's saloon in taking that observation?

314 A. Yes, sir.

Q. Did you observe as you drove down at that time from White's saloon whether or not you could see that train that was standing on the side track and seventy feet from the crossing over the top of these box cars that was standing adjacent to the freight depot?

A. That was what I was in the buggy for—to examine close and see if I could see it. I could see it; yes, sir.

Q. Well, how much of the way could you see it from White's saloon down to the railroad crossing?

A. All the way from White's saloon to the point about 36 or 38 feet from the north track of the railroad.

Q. That is the main track where the collision occurred?

A. The main track of the crossing where the collision occurred.

Q. Will you mark on that diagram just where you drove? Did you drive the team yourself?

A. I drove the team myself.

Q. Now take the pencil and mark on that diagram about where you came around.

A. (Witness indicated on diagram course travelled by him.) Down to this point. I will say that is between 36 and 38 feet from the north rail of the track where the collision occurred. Now, this was all the request of the superintendent. I done it very reluctantly. I was requested to examine from this point if I could see the caboose that stood in here and I could. My team is stopped now, standing between 36 and 38 feet (indicating point on diagram).

Q. At that point, 36 or 38 feet from the place where the collision occurred, could you see the caboose over the top of this box car?

A. Over the top of the end box car—the one that stood close to the crossing.

315 Q. You could see that caboose when it was standing seventy feet up here all the way coming down to that point?

ANDREWS: We object.
McNAUGHT: We want to get it definite.
COURT: You ought to be satisfied after you get at it once.

Q. Now, after you had made that observation about 36 to 38 feet from the place where the collision occurred, did you make any other observation when you were nearer the place of collision?

A. Yes, sir. I then drove the team up to a point where I was sitting, in the neighborhood of 22 feet, leaving my body in the seat about 22 feet, 22 to 26 feet—in that neighborhood—that I could then see the top of the caboose, but bwetween 36 and 38 foot point and the 22 to 24 foot point there is about 8 to 10 feet between here that I could not see the caboose—that is, coming right direct from the end of this box car, the train standing here about seventy feet from this crossing up here. There is about 8 to 10 feet that I could not see between the 22-foot point and the 36-foot point.

Q. Did you take any observations when you were, say, from 22 to 20 feet from the track on whcih the collision occurred?

A. Yes, sir.

Q. What did you discover there?

A. I could see the car very plain there.

Q. Over the box car or past the corner?

A. Past the corner; past the end of the box car.

Q. How was that box car standing at that time as to being down even with the planking or a little over the planking?

A. At this depot there is a platform at the end from this point. These marks represent that. There is an incline that runs off to this crossing. The box cars stood, I think, in the neighborhood of a foot past this incline here and were rather on the edge of the crossing.

Q. Stood there when you made these observations?

316 A. Yes, sir.

Q. Now, did you make any observations when your team was standing 20 to 22 feet from the north track upon which the collision occurred as to how near your horses were to that track?

A. Yes, sir; I did not measure it, but looking along the team I would suppose they were from four to six feet from the track—from the rail, I mean, to the north rail.

Q. Now, can you state, Mr. Maloney, how this planking compares now with what it was in the fall of 1883 as to grade and location?

A. Well, there is no material change as to location or grade; there has been a little more planking. I think this track was put in there since then. I am not positive as to the grade; in the location there is no change at all.

Q. How is it as to the grade in the street from White's saloon where you drove along down to this crossing?

A. In the wagon road there has been no material change.

Q. The same as it was then?

A. Yes, sir.

ANDREWS: We object.

Q. Now, Mr. Maloney, you say you took these measurements when the train was seventy feet. Say how you know it was seventy feet.

A. I measured it with a tape-line.

Q. Do you remember, Mr. Maloney, about how the ground was, the location of the ground, off just immediately west of that planking about the time in the fall of 1883, whether or not there was anything immediately west of where these box cars stood there on the track next the depot to interfere with a person turning off to the west?

A. No, sir; there was nothing there, only there was a little—the
planking of that platform was not there; there was probably
317 a jump off of 10 to 14 inches that would have been a jar
down.

Q. That was the only thin*k* that was in the way?

A. Yes; I am satisfied that was all there was in the way; that depot was not below there then.

Cross-examination.

Questions by **ANDREWS**:

Q. Point -o the place on that planking that you stood when you made the observation at 22 feet away from the north track.

A. I presume it was in here. I don't know what scale that was on, but I am satisfied that it was 22 feet because I measured it; as to the scale on this map I could not say anything about that.

Q. You say north of that planking there has been no material change. Has there been any change? Has it not been filled in by that planking? Has not the planking been extended?

A. This planking, I think, has been *o*ut in since this accident; there is another track through there.

Q. Is not that planking higher than the land was originally?

A. Well, not very much.

Q. Well, is it any higher comparatively?

A. I would think it was the height of the planking higher.

Q. Whose buggy did Weymouth have? Did he have one of yours?

A. No, sir.

Q. You are a livery-stable keeper?

A. No, sir.

Q. Engaged in the business in some way?

A. No, sir.

Q. Do you know anything about the height of buggies?

A. Don't know about their height; that is the first buggy
318 I ever measured; probably would not have done that if not
requested to.

Q. What is your height, Mr. Maloney?

A. About six feet and an inch and a half.

Q. Mr. Maloney, were you deputy sheriff at the time that sheriff sale was had at Sprague in the matter of W. H. Marshall against Silver?

A. Yes, sir.

Q. What day did that sale occur?

A. Well, I think it occurred on the 5th or 6th. I looked through the records. I see it is on the sheriff's return of the execution. It is marked the sixth. It was either the 5th or 6th.

Q. Was that the same that you sold a dray or truck to Thomas Smith?

A. Yes, sir.

Q. Was that the same truck that Vinard was subsequently driving?

A. He was driving that one afterwards. There was another one in town at that time—at the time of that sale.

Q. The dray truck that Vinyard was driving was this one that you sold on that day?

A. He drove that out immediately after it was bought.

Q. Have you any knowledge of his driving before that time?

A. He did not; I had a man by the name of Hillhouse running it for two months before the sale.

Q. I would like to ask you when you said 22 feet from the north line of the track could you see the whole of that caboose or part of it.

A. Only part of it.

Q. Just draw a line across the end of that caboose that was visible.

A. Probably like that (witness indicated about half a caboose), half of it lengthwise.

Q. I would like to ask you if at the time you made these experiments if you were not looking for this car at the first instant
319 possible to see it.

A. I was looking all the time every foot of the way from the time I got from this place that I was requested to make the observations from, and of course could see it all the time, as I stated.

Q. Now, from about this point, I understand you to say, down from this point (indicating) somewhere, you could not see the car over the top of the box car or past the end of it.

A. Well, now, as to this diagram here I don't want to have anything to do with my evidence; but we will call this the north track; from a point 36 to 38 feet from that rail to a point 22 to 26 feet from it there is eight or ten feet that I could not see it on account of coming right in on the end of the box cars.

Q. The further west this box car is moved the further your line of vision would be removed; you were compelled to look by this box car?

A. After passing the 36-foot point in order to see the caboose?

Q. Yes, sir

A. There is a place here where you could not see over the car—that is, the next vision you had was around it.
Q. When you saw over the car at this point where was the car, 70 feet away?
A. Yes, sir.
Q. From the centre of this crossing?
A. Yes, sir.
Q. What part of the caboose could you see?
A. We saw the top of the caboose.
Q. You could see the pilot?
A. You could see the top of the cupola, a part of it.

320 Redirect examination:

Q. Mr. Maloney, he asked you about the height when taking these observations. State when you were 36 or 38 feet from the north track of the place where the collision occurred—state how you took those *p*bservations, what position you were in.
A. I was in this position (indicating).
Q. With your elbows on your knees?
A. With my elbows on my knees.
Q. How were you as to sitting on the seat in the buggy?
A. I was sitting on the seat of the buggy; on the cushion part of it.
Q. Now, why did you take that position?
A. Why, I spoke--I said I was somew*ah*t higher than Holmes, and I wanted to see how low I could see it.
Q. And at that point you could see it when you had your elbows down ~~on~~ your knees sitting in the buggy?
A. Yes, sir.
Q. Over the top of the box car?
A. Yes, sir; from the 36 to 38 foot point.
Q. When the train was away from the crossing?
A. Yes, sir.

321 Frank Brunsen, a witness for defendant, sworn.

Questions by McNaught:

Q. What is your full name?
A. Frank James Brunsen.
Q. What is your age?
A. Age, 16.
Q. Where do you reside?
A. Sprague.
Q. How long have you lived in Sprague?
A. Three years in May.
Q. Were you in Sprague, Frank, in the fall of 1883?
A. Yes, sir.
Q. Did you witness the collision between the train of the Northern Pacific Railroad Company and a buggy or carriage driven by Mr. Holmes?
A. Yes, sir.

Q. Where were you just prior to that collision?

A. On the back end of the caboose.

Q. Suppose, Mr. Brunsen, that this, the cabosse and train—just point out to the jury where you were on that.

A. I was on this side of the step.

Q. On the caboose step?

A. Yes, sir.

Q. Did you observe how that train was made up?

A. No, sir; I did not; all I know it was a caboose; I don't — how many more cars there were.

Q. Now, just go on and state to the jury what you saw and what you did yourself.

A. I was up to the shop, and as I came down the train was coming along and I jumped on and rode down, and as I was 322 coming along here I was looking towards the post office and happened to look across here. I saw Mr. Holmes coming in a buggy, and when I looked around he was whipping the horses, and I rode on a few feet further and I thought the caboose was going to hit the buggy and I jumped off and ran from here to the switch across here. As I ran across here ahead of the train and got on the switch, as I got by there, the buggy came along towards the switch. I thought it was going to turn over. I ran down here further and I turned around and Mr. Holmes was lying on the ground and the men were running from the post office over there.

Q. When you jumped off the caboose car you ran along down toward the crossing?

A. Yes, sir.

Q. And how much faster than the train was you moving at that time, Frank, do you think?

A. Well, I don't know; I could not say how much faster.

Q. Well, you did go faster?

A. I went faster than the train, I know. I got there before the train did.

Q. Did you notice where the train stopped after the collision?

A. No, sir. I ran about 15 to 20 feet past the switch. When I got there the train had stopped.

Q. You did not notice from there where it did stop?

A. No, sir; I did not.

Cross-examination.

Questions by ANDREWS:

Q. Did you run in front of Holmes' team?

A. Yes, sir.

323 Q. Where was he when you first saw him?

A. Well he was about here (indicating edge of crossing on def't's diagram)—his horses were.

Q. Holmes' horses were about on the edge of the planking?

A. I could see Holmes; looked to be 15 to 20 feet from this track here (indicating north track).

Q. Did you see any other teams?

—. I did not take any notice.

Q. You say when you first saw Holmes' team they were on the edge of the planking?

A. Yes, sir.

Q. Mr. Holmes in the buggy behind them?

A. Yes, sir.

Redirect examination:

McNaught: You could look past as you were backing down? You saw past the end of the box car and saw his team?

A. Yes, sir.

324 **S. Ladd**, a witness for the defendant, being duly sworn, testified as follows:

(By Mr. **McNaught**:)

Q. What is your occupation?

A. Locomotive engineer.

Q. How long have you been engaged in that business?

A. I have been running an engine about eight years.

Q. In whose employ are you at the present time?

A. N. P. Railroad Company.

Q. What division are you running on at the present time, if any?

A. Idaho division.

Q. Are you acquainted with the company's yard at Sprague?

A. Yes, sir; considerably.

Q. About what rate of speed, if you know, can you get from a train consisting of an engine and four cars in a distance of 140 feet and stop and start the train in that distance in that yard?

A. Well, it depends a little on what part of the yard.

Q. There is a different grade in different parts of the yard?

A. Yes, sir.

Q. Suppose, Mr. Ladd, it was a train moving down from some place in here, some of these side tracks, down toward the crossing, what rate of speed could you get up in this distance of 140 feet, running along down here, starting and stopping your train within that distance?

A. Well, where those cars are there the grade is considerable heavy and you could get up a speed of, probably, and stop in 140 feet—of probably four and a half or five miles an hour; somewhere in that vicinity.

Q. That is, per hour?

A. Yes, sir.

Q. At that rate?

325 A. Yes, sir.

Q. Were you engaged in running for the company in 1883 on this division?

A. Yes, sir.

Q. Have you ever given any attention to the grade, as to whether it is the same now that it was then?

A. Yes. I do not know of any change.
Q. How fast do switch-trains run in that yard, Mr. Ladd, and what is their variance, what would be the greatest rate of speed in the yard, and the usual rate of speed in the yard?

Andrews: We object. Our objection is that it does not make any difference what the usual rate of speed was. The witnesses have all testified to the rate of speed on this occasion. Their witnesses have none of them placed it over five miles an hour. I do not wish to have any contention, but if they were to show a rate of speed that would be dangerous to human life and limb I think that it would be improper to show it. They have no right to show a custom that is dangerous to anybody, especially on a highway.
The Court: I am inclined to sustain the objection.
McNaught: We will preserve an exception.
Exception allowed.

Q. State, Mr. Ladd, what distance a train running at the rate of five or six miles an hour, where it is passing over a frog, on an ordinarily calm day could be heard.

Andrews: We object.
The Court: Objection sustained.
McNaught: We will preserve an exception.
Exception allowed.

Court adjourned until the following day.

326 Tuesday, *November 10th*, 1885.

Court opened pursuant to adjournment.

George R. Blackwell recalled.

(By Mr. McNaught:)

Q. Mr. Blackwell, state what information you had, if any, prior to actual collision of your train with Holmes' carriage that Mr. Holmes was approaching the crossing.
A. What information I had?
Q. If you had any.
A. I had none.
Q. State, Mr. Blackwell, within what distance you can stop a train composed of an engine, caboose car, two flat cars, and a box car, running west in Sprague yard at and about the place where the collision occurred—if a train is running at the rate of 12 miles an hour—without using air, running west, down grade, at that place.
A. Well, I should judge in about—without figuring on the thing—I should judge in the neighborhood of 150 to 200 feet—somewheres near that, at 12 miles an hour; it would depend on the condition of things.
Q. Is that estimate made without air?
A. It will take longer to stop a train without air than it will to get it under motion.

Cross-examination.

(By ANDREWS:)

Q. You say that you had no information that Holmes was approaching the crossing. Were you on the locomotive when it went over the crossing east?

A. Yes, sir; I was.

Q. Did you look up and down that crossing, on either side of it?

A. I looked back as I backed down, but I did not look as I was going east.

327 Q. On either side of the crossing?

A. No, sir. It was not my duty to look on either side. I did not look. My signal was ahead.

Q. You was looking at your signals alone?

A. Yes, sir.

Q. When you reversed the motion of your train and started backwards did you look back?

A. Yes, sir.

Q. Did you look for persons on the crossing?

A. I glanced back. There was nobody on the crossing that I saw.

Q. When you looked back?

A. I could not see no team—nothing. I did not take a look for anything; I just glanced back.

Q. After you had reversed the motion of your train did you look on the crossing again?

A. No, sir; I did not.

Q. Then all the time the train was moving back——

A. My signals were ahead and my work was ahead.

McNAUGHT: You were looking at your signals and watching your work?

A. Watching my work ahead.

Q. There is one question I forgot to ask Mr. Blackwell. In the switch-yard, at that time, Mr. Blackwell, what is the meaning of the signal—for instance, if your train was headed east—you get a signal from the yard master, what would that mean—back up (indicating)?

A. Yes, sir.

ANDREWS: We move to strike it out.

The COURT: I will not strike it out. I guess there will not be any dispute that that is the meaning of such a signal.

328 ANDREWS: We are not prepared to do that, if the court please.

S LADD recalled:

Q. You stated upon yesterday that you were acquainted with the Sprague yards—switch-yards?

A. Yes; considerable.

Q. Mr. Ladd, within what distance can you stop a train with safety composed of four cars and an engine running west in Sprague yard at the rate of twelve miles an hour?

Andrews: We object to the question in that form.
The Court: Objection overruled.

Q. Answer the question.

A. To stop at 12 miles an hour at this particular point where this accident occurred would—well, I should judge it might stop in the vicinity of 225 to 250 feet.

Andrews: Did you ever try a train there of this kind to see how soon it could be stopped?

A. No, sir; I never was liable to hit anything in that yard; never had occasion to see or never had any violent signals in that grade in starting and stopping my trains.

Q. I would like to ask you, when you go over this crossing in question — you look to see if this crossing is clear when you start a train over it?

A. I do—that is, I always look back at my signal when I get one.

McNaught: You always watch your signal—run by your signal?

A. Yes; run by my signal.

Andrews: If the court please, counsel has put words in the mouth of the witness all the morning.

329 The Court: I think counsel has no right to assist the witness in his answers.

Andrews: The question I asked you was this: When you start a train over that crossing and in close proximity to it, do you look at the crossing to see whether it is clear?

A. I do; my train—my passenger train. I am bound to watch everything with my passenger train.

McNaught: You never run a switch-train in that yard?

A. No, sir.

Dr. Pomeroy, a witness on behalf of the defendant, being duly sworn, on oath testified as follows:

(By Mr. Turner:)

Q. You live here in Cheney?

A. Yes, sir.

Q. How long have you lived here?

A. Since a year ago last April.

Q. Are you a graduate of a medical school?

A. Yes, sir.

Q. How long have you been practicing medicine?

A. I have been practicing medicine about seven years; my diploma, however, is dated since that time.

Q. Do you know Mr. Holmes, the plaintiff?

A. I have seen him.

Q. Did you have occasion to examine him at any time?

A. Yes; I examined him a year ago, I presume it was.

Q. At whose request?

A. At his request.

Q. How long ago?

A. It must have been either last term of court or the term
330 before that. Did this case come up the last term? I have got
a note of it, but not with me.

Q. It was at the time the case was tried before?

A. Yes, sir.

Q. Doctor, from your examination of Mr. Holmes and from his injuries what would you say with reference to his ability to work or labor or do any kind of labor?

A. Well, I should think that there might be a great many things that Mr. Holmes would be able to do. He could not do all kinds of work, but there is lots of things he might do to be occupied at.

Q. You mean in the way of physical labor?

A. Well, I don't know. He could not hire out by the day or anything of that sort, but there is things he could do to earn a reasonable compensation, I should think.

Q. Can you state to the jury what effect light labor would have on Mr. Holmes?

Andrews: We object.

The **Court**: Why do you object?

Andrews: I don't know that the testimony of a physician is the testimony of an expert upon that matter. They have Doctor Pomeroy here as an expert, and he has already testified with reference to his physical condition.

The **Court**: I will overrule the objection.

A. I rather think it would be beneficial to the man to have some occupation.

Q. Some light labor?

A. Something.

Q. What effect would it have upon his mental condition?

A. It would certainly have a salutary effect.

Q. Physically and mentally?

331 **Andrews**: We object. You are leading the witness.

A. Yes. A man can never enjoy good health, physically or mentally, if he is not occupied with something.

Q. Dr., have you had occasion in your medical career to observe the medical effects of alcoholic stimulants upon the human system?

A. Yes, sir.

Q. I wish you would describe, if you please, to the jury its effects upon one.

A. The first effect of alcohol upon the system is an excitant; it excites all the functions of the human organism, and if it is continued in for any length of time the next effect will be what is termed perturbation—that is, a change of the whole mind. A man becomes not himself, and all the functions of the brain are modified to a certain extent; the sight, hearing, feeling, taste, and everything is impaired to a certain extent. Of course it is owing to how much stimulants have been taken. The last effect is what we term collapse; a person becomes perfectly comatose or in, you might say, a paralyzed condition; he is unable to move if he has taken too much of it.

Q. What effect, if any, Doctor, for a man to take a number of drinks of whisky, would it have upon his hearing?

AMDREWS: We object. The question is too indefinite.

Q. I will say six drinks of whisky in one day?

ANDREWS: If the court please, we shall object again.

COURT: Objection overruled.

ANDREWS: We will except.

Q. What effect, if any, would five or six drinks of whiskey have taken by a man in one day, upon his hearing or vision?

A. Well, it would produce a dimness of vision, and it would produce a roaring noise in the ears, I should think—I am cer-
332 tain it would—and the functions of the brain are partially
suspended. He is not himself. None of his senses are as acute if he has indulged to any extent.

Q. For how long a time would that sensation or condition last probably?

A. Well, for a few hours until the patient had had sleep or something of that kind.

Q. Have you had occasion to examine any medical authors or works on medical jurisprudence on that subject?

A. I have. I have examined Professor Hammond on Nervous Diseases. He described it there very thoroughly.

Q. In accordance with your experience as you have just detailed it?

A. Yes, sir.

Q. I have here "Diseases of the Nervous System." Is that one of the authors you refer to.

A. Yes, sir.

TURNER: I do not know what the ruling is with reference to offering that book in evidence.

The COURT: You can offer it.

Q. Is that a standard author, Doctor?

A. Yes, sir.

ANDREWS: We object. The practice, far as I know, has been to exclude books of science from going in evidence.

McNAUGHT: If they insist upon the objection we do not care to offer it.

ANDREWS: I believe we will insist upon the objection.

333 Cross-examination.

(By Mr. ANDREWS):

Q. Would six small drinks taken in the course of, say, seven hours' time dim a person's vision and obstruct the sense of hearing?

A. It depends greatly upon the person, also upon the condition of that person.

Q. The physical condition?

A. The condition of the system—if the stomach were empty; and also perhaps upon the occupation, whatever a person might be laboring at, would have.

Q. Suppose that the day was cold when these drinks were taken, he was outdoors, would that diminish or increase?

A. It would increase.

Q. Are you positive about that, Doctor?

A. I am.

Q. It depends much you say, though, on the condition of the person?

A. Yes, sir.

Q. Is there not a difference, too, in persons? Cannot some persons carrying very much more liquor than another and still have perfect control of the senses?

A. Yes, sir.

Q. Have you not known cases where a person could carry six to ten drinks and still have control of his senses?

A. Yes, sir.

Q. Have you not known these cases to be quite frequent.

A. Well, it is owing to whether a man is addicted to it, if he is used to it it will have a different effect.

Q. How long after a person has taken a drink of liquor will it be before it dims the *the* course of the vision and causes a roaring in the ear? 334

A. Well, it is owing to how much has been taken. If a large quantity has been taken the stage of excitement is much shorter than if a small or reasonable quantity.

Q. Is it not true, Doctor, that especially with strong liquor that small drinks stimulate for a longer time than large?

A. Yes, sir.

Q. The immediate effect of a large drink is almost immediate depression?

A. Well, not depression exactly. There is the third stage; that is, the person is depressed, and they then fall down, perhaps, if they have taken large enough quantity; it is called perturbation; then they forget, their head swims and these noises are in their ears, then from that they fall.

Q. Now, Doctor, when a person is suffering from perturbation he is drunk?

A. Yes; he staggers when he walks.

Q. Then, when this roaring noise is in the head a man will stagger?

A. Yes, I should say he would.

Q. I would like to ask you another question. Suppose a man takes half a pint of whiskey, and gives nearly all away to his friend, what effect would that have upon him in the way of obstructing his hearing and his vision?

A. I will leave that to any man—the jury knows what effect that would have.

McNaught: Suppose, Doctor, that you went out into the country with a friend, and you and your friend came back without any whiskey?

A. They would evidently be drunk.

335 Hillhouse, a witness for the defendant, being duly sworn, on oath testified as follows:

(By Mr. McNaught:)

Q. Where do you reside?

A. Reside at Sprague.

Q. How long have you resided there?

A. I came there in October, 1882.

Q. What business, if any, were you engaged in — 1883?

A. I was running a truck in Sprague.

Q. How long did you continue in that business?

A. Well, most of the time during 1883. I think I did not quit the truck business until April, 1884.

Q. In the fall of 1883 were you acquainted with the place where White's saloon was located at that time?

A. Yes, sir.

Q. Were you acquainted with the ground from that point down to the railroad crossing at the freight depot?

A. Yes, sir.

Q. What was the condition of that ground there in the month of November, 1883, in reference to its present condition upon last Sunday?

A. I don't think there is any material change in the ground, not since; no material change.

Q. In the place where the road runs now, how does that compare with the place where the road run then?

A. The road is just the same as it was then at the present time.

Q. Was there anything there in November, 1883, that there is not there now, or if it is there now, that was not there then, that would prevent a person seeing or enable a person to see over the tops of the box cars a locomotive or caboose beyond it, if the box car were on the side track next the freight depot abutting on the crossing? Is there any change?

336 A. No, sir; I don't think there is a particular of change in it.

Cross-examination:

(By Andrews:)

Q. Do you know whether or not any gravel has been filled in there or not just north of that planking since the first of November?

A. I think there has been none except crossing the street to the Gem saloon, perhaps there may have been a little filled in, but not between the saloon and the crossing.

Q. Was you in Sprague when the track was built on the north side of the depot?

A. Yes, sir.

Q. Do you know -*eh*ther anything has been fil-ed in there (indicating)?

A. Not at that place.

Q. Suppose that map (indicating plaintiff's diagram) be a correct map of the location, state whether or not anything has been filled in along there anywhere (indicating) or along there anywhere where the small pencil line is.

A. I don't understand just how this lies.

Q. Supppse this to be the post office (indicating), this the freight depot, etc., will you inform the jury whether or not any dirt has be-n filled in here anywhere, from this point out to this point?

A. There has been none from White's saloon up that way.

Q. Where has the gravel been filled in?

A. Perhaps there has been a crossing right there from the old depot to the old Gem saloon.

Q. Was you in Sprague at the time this accident to Mr. Holmes happened?

A. Yes, sir.

337 Q. Do you remember when it was?

A. I do not remember the exact date.

Q. Do you know when David Vinyard got a dray and went to draying in Sprague?

A. Yes, sir.

Q. What day was that?

A. I could not say. It was along the first of November; I think he took it on the sixth day.

Q. Did Mr. Vinyard drive a dray at all until he bought one at sheriff's sale?

A. Not for some time before. He formerly run the same dray in Sprague, one I was running at the time.

Q. Did he for a month or such matter?

A. No, sir.

Q. Are you positive, Mr. Hillhouse, that he was not driving a dray on the first of November, 1883?

A. I think I am.

Redirect examination.

(By Mr. McNaught:)

Q. Where were — on the day that the accident occurred to Mr. Holmes?

A. I was over——

Q. Were you in Sprague?

A. I was in Sprague that day.

Q. Do you know who was running the draying business at Sprague at that time?

A. Yes, sir.

Q. Who?

A. Nelson & Collins, one dray firm for which I was driving, and Vinyard and Smith, then.

338 Q. And Vineyard was driving a dray upon that day?

A. He was.

Recross-examination.

(Andrews:)

Q. I cannot understand your testimony, Mr. Hillhouse. I understood you to say that Vineyard was not driving on the first of November.

A. He was not.

Q. Did you not say that he was—that Vineyard and Smith were driving a dray?

A. No, sir; at the time Holmes was hurt, on the day of the accident.

Q. Do you remember the day the accident occurred?

A. I do.

Q. Do you remember Vineyard and Smith were driving a dray on that occasion?

A. I remember Vineyard was driving.

Q. You saw him driving on that day, did you?

A. Yes, sir.

Brunsen recalled.

(McNaught:)

Q. Were you in the employ of the railroad company at the time of the collision?

A. No, sir.

Q. Were you connected with the train at all?

A. No, sir.

Cross-examination.

(Andrews:)

Q. Are you in the employ of the defendant now?

339 A. The railroad company?

Q. Yes.

A. Yes.

Q. Have been for some time?

A. It will be three years in May.

340 Mr. Bradley, a witness for the defendant, being sworn, testified as follows:

(McNaught:)

Q. How long have you resided in Sprague, Mr. Bradley?

A. In Sprague since 11th April, 1883.

Q. What business have you been engaged — since that time?

A. I am employed by the Northern Pacific Railroad Company since that time.

Q. At what work?

A. Track-work; part of the time laborer, remainder of the time foreman in the Sprague yard.

Q. Were you in the fall of 1883 acquainted with the ground near the freight depot and west of there as far as White's saloon, on the north side of the railroad track?

A. I was thoroughly acquainted with the ground.

Q. At that time?

A. Yes, sir.

Q. Look at this diagram here, and suppose that this is the crossing, this the freight depot, White's saloon up here. Now explain to the jury what changes, if any, have been made in that ground in there since that time and who made them.

A. Since the accident occurred?

Q. Yes, sir.

A. There has been a side track laid north of the depot and runs in front of White's saloon, right along here. Here is the freight-house, and at that crossing it has been graded there, just where the side track stands north——

Q. Has been raised at that point?

A. Not over eight inches.

Q. Who made that grade in there—who did that work?

A. The Northern Pacific Company; an extra gang.

341 Q. What change, if any, has been made in the road running along here, from there down here?

A. There might be a litfle rubbish thrown in the street; perhaps a few wagon-loads of dirt. That is all.

Q. Has there been any change in the street or in the grade from this track north of the freight depot since, from there down to this planking along here west of the freight depot?

A. From the side track north of the depot?

A. Yes, sir.

A. There is about six inches.

Q. About six inches of a fill?

A. Yes, sir.

Q. Who did the work?

A. I did.

Q. When was this work done, about?

A. It was washed out in February, 1884, and immediately after the water subsided I filled her in.

Q. Now, is there any other changes around here about this crossing and between that track and these crossings than those that you have mentioned since the fall of 1883?

A. Nothing more in the grade.

Cross-examination.

(ANDREWS:)

Q. How deep did the water get there before you filled that in?

A. It washed out, I should judge, about 12 inches.

Q. So that when the water was standing there it would be 12 inches deep?

A. It was not standing; it was running continually.

Q. 12 inches deep?

342 A. Yes, sir.

Q. You say it is filled in. Does any water stand along there anywhere now?

A. No, sir. At that time there was an overflow of water at Sprague.

McNaught: You mean as long as the overflow lasted?

A. Yes, sir.

McNaught: We will offer the testimony of Robert Johnson.

343 *Testimony of Robert Johnson, a Witness on Behalf of Defendant, at Trial at April Term,* 1885.

Direct examination.

Questions by McNaught:

Q. What is your name?

A. Robert Johnson.

Q. Where do you reside?

A. In Walla Walla at presentz.

Q. Were you, if at any time, in the employ of the Northern Pacific Railroad Company?

A. Yes, sir.

Q. About when?

A. Between the 4th of September, 1883, and the 22nd day of January, 1884.

Q. Where were you employed?

A. At Sprague, in the yard and on the main line.

Q. Were you employed in the Sprague yard about the first of November, 1883?

A. Yes, sir.

Q. What were you doing?

A. I was firing switch-engine at Sprague.

Q. Who was the engineer in charge of that engine?

A. George Blackwell.

Q. Do you remember anything about a collision between your switching train and carriage driven by Mr. Holmes?

A. Yes, sir.

Q. Where were you at the time the collision occurred?

A. Well——

Q. That is, with reference to your train, were you in your engine or out of it?

344 A. Yes; I was on the engine.

Q. State whether or not the bell on the engine in that train which collided with Mr. Holmes' wagon was ringing during all the time it was backing prior to and at the time of the collision.

A. Yes, the bell was ringing.

Q. Who rang the bell?

A. I rang the bell.

Cross-examination.

Questions by ANDREWS:

Q. Mr. Johnson, do you remember seeing a crowd of persons around Holmes just after the accident?

A. Yes, sir.

Q. There was quite a crowd of people there, was there?

A. Yes, sir.

Q. Do you remember any conversation at that time that the bell was not ringing, any general conversation?

A. No, sir.

Q. You do not remember any such general conversation?

A. No, sir.

Q. There was no such conversation, was there?

A. Not that I know of.

Q. Did you get down out of your engine?

A. No, sir.

Q. You did not get down? You say you rang that bell?

A. Yes, sir.

Q. When did you commence ringing that bell?

A. Well, I commenced ringing from the time I got on the engine. When I was on the engine I rang the bell whenever we were moving.

345 Q. Now, what makes you remember at this time that you rang the bell on that particular occasion?

A. The ringing of the bell was no particular occasion. I rang the bell at all times when we were moving.

Q. The only reason you testify now you rang the bell on that occasion was because it was your custom to ring the bell. How is that?

A. Well, I was ringing the bell. I don't know at this time any more than at any other time.

Q. You say you don't know at this time whether you rang the bell at this time any more than any other, only you know you always rang the bell?

A. How is that?

Q. Do I understand you to say that you don't know whether you rung the bell on this occasion, only you do know that you——

A. I have not got your meaning.

Q. I will try and get at it. It was your custom to ring the bell, was it not?

A. That was a portion of my duty.

Q. Now, you always discharged that duty?

A. Yes, sir.

Q. You always rang that bell?

A. Yes, sir.

Q. Now, do you remember that you always rang that bell?

A. Yes, sir.

Q. Do you remember positively that you rang the bell?

A. Yes, sir.

Q. Every time that you went over this crossing?

A. Yes, sir.

346 Q. You remember that now, do you?

A. Yes, sir.

Q. Now, do you remember that you rang the bell on this occasion any better than you remember having rang the bell on every occasion?

A. State that again.

Q. Do you remember having rang the bell on this occasion any better than you remember having rang the bell on every other occasion?

A. Rang any better on this occasion than any other?

Q. Do you recollect any better as to this particular occasion when Holmes was hurt than you do as to any other occasion?

A. No, sir; I do not know that I rang it any more than any other time.

Q. Then the reason you say now the bell was ringing is simply because you remember that it was your custom to ring it? Is that the reason?

A. No, sir; I knew that I was ringing the bell.

Q. At that time?

A. Yes, sir.

Q. Well, how far east did that train go on that occasion, Mr. Johnson?

A. Before the accident occurred?

A. Well, yes. How far east did you go before you reversed the engine?

A. Well, we were moving up the track and hooked onto some cars and were backing down.

Q. Which track did you move up? Look at that plat to your right, Mr. Johnson, and show to the jury which track you moved up.

A. I think this is the track we came up (indicating on diagram).

Q. When you came down, you came down from that track, did you?

A. Yes, sir.

Q. How far west did the train move in this direction (indicating to the west)?

347 A. I think we were intending to come down here. We ran below that switch, I know, and stopped at that switch and came up.

Q. Your recollection is that you were intending to come down so this car would pass that switch?

A. Yes, sir.

Q. That would throw the west end of the train down somewheres here, would it not?

A. No, sir; it would throw the train somewhere along here.

Q. You had to get by this switch, did you?

A. Yes; I think so.

Q. That is your recollection?

A. Yes, sir.

Q. You think you were coming down off from this track?

A. Yes, sir.

Q. Are you quite positive about that? Might you not have been on this track (indicating)?

A. No, sir; I think this is the track we were on.

Q. That is the best of your recollection?

A. Yes, sir.

Q. And you were going down far enough to escape this switch and then come down here?

A. Yes, sir.

Q. At what rate of speed were you moving on that occasion?

A. We were moving very slow.

Q. Two miles an hour, say?

A. Well, yes.

Q. About two miles an hour. Do you remember which end of the caboose car the cupola was—towards the west or towards the east?

A. No, sir.

348 Redirect examination:

Q. He asked you if you were running two miles an hour. State about what rate of speed was your train running when you were backing down just prior to and at the time of the collision.

A. We were running two or three miles an hour, I should judge; about four miles an hour.

ANDREWS: Is that your usual speed in the yard of switching trains—was it at that time?

A. I believe it was. We were not allowed to run faster than that.

McNAUGHT: Do you mean to say that you were not allowed to run more than four miles an hour in the yard or faster than you were running, or that you were running about the usual rate of speed?

A. Well, I don't remember exactly, but we were running about the usual rate of speed that we always run in the yard; about that rate, I should judge.

349 McNAUGHT: We will offer in evidence the diagram we have tacked up there on the wall.

ANDREWS: We desire, when the time comes, to offer our diagram also in evidence.

The COURT: They will both be considered in evidence.

ANDREWS: We don't have any objections to their putting a diagram in evidence, but we don't want to admit it is true.

The COURT: Certainly.

McNAUGHT: We rest.

350 *Plaintiff's Rebuttal.*

JAMES HOLMES recalled.

(ANDREWS:)

Q. Mr. Holmes, did you have a conversation with Mr. Blackwell, about 10 or 12 days after the accident occurred which we have been examining here, with reference to the ringing of the bell?

MCNAUGHT: We object. They asked Blackwell if he had had a conversation with Mr. Holmes about the ringing of the bell. They neglected to fix the date and the parties present, etc.

ANDREWS: We asked if it was at his cabin 10 or 12 days after the accident in the presence of his father-in-law, and if he did not say such and such words.

MCNAUGHT: We will withdraw the objection.

A. I did have a conversation with him.

Q. In that conversation did Mr. Blackwell say to you in substance that the bell on that occasion was not ringing?

A. No.

Q. Did he say to you on that occasion that the bell was not ringing or words to that effect?

MCNAUGHT: We object. He should give the words he says.

The COURT: Objection overruled.

MCNAUGHT: We except.

A. Well, I will give you the words he used. He says, "Holmes, damn if I can tell whether the bell was ringing or not." Those are the words he used.

351 JAMES B. NELSON, a witness for the plaintiff, recalled.

(ANDREWS:)

Q. Were you carrying on a livery business in Sprague about the first of November last?

A. Yes, sir.

Q. Was it your rig that Holmes had on the day of the accident?

A. It was.

Q. Did you make a charge against him?

MCNAUGHT: It is immaterial. It is not new matter in any event.

ANDREWS: The question we propose to ask is whether or not he made a charge against Holmes at the time the accident occurred.

The COURT: You wish to lay a predicate to put the book in evidence as showing the date of the accident?

ANDREWS: Yes, sir; we will do that or want to take the testimony of Nelson as to the time of the accident.

The COURT: I think this question of date has become material since the plaintiff rested his case, whatever effect it may have.

Q. Mr. Nelson, will you look at that book and inform the jury what it is?

(Book handed witness.)

A. Well, sir, on the first of November there is a charge to Holmes——

McNaught: Don't speak of what the book contains until we have a chance to look at it.

Q. Just inform the jury what it is. Was that your ordinary day book?

A. Yes; that is the blotter we use.

Q. That was the book that you were using at that time?

A. Yes, sir.

Q. Were you in the habit of making your entries in that book at the time they occurred?

352 A. I was; both me and my partner both. Sometimes when we took in the rigs that was the day we would make the charge.

Q. When did you make that charge—on the day the rig went out or on the day it was brought back?

A. The day it was brought in.

Q. Have you any recollection independent of the book, Mr. Nelson, as to when it was that this accident occurred—that is, the exact date?

A. No; I could not state outside of the book.

Q. Can you state by referring to the book?

A. Well, I can, as near as I can recollect. It is customary always when a rig comes in we would charge it unless sometimes a man would state, You need not put that down in the book; I will hand it to you before night; and if he did not maybe it would run along until the next day and we would make some entry about the same date.

Q. Now, by looking at the book and refreshing your memory do you know when it was that the injury occurred to Mr. Holmes?

A. I think I would.

Q. Then, would the book recall to your recollection the fact as to the date?

A. As near as I can judge, it would; I would state that that would be correct.

Q. I will ask you, Mr. Nelson, if there is another charge on the book against Holmes for a rig.

A. Yes, sir.

Q. Is that particular charge the last one you made against him?

A. Yes, sir.

Q. I will ask you if he paid you for the rig at the time he got it.

A. Not at the time he got it?

353 Q. So that it was a proper matter of entry in your book?

A. It was some time after he got around; two or three weeks.

Cross-examination:

McNaught: I desire to cross-examine a little.

Q. Mr. Nelson, you say you made entries in this book and your partner made entries in his book?

A. Yes, sir; the one that would take the horses in would generally make the entry.

Q. Now, I observe at the bottom, where the entry is, is mutilated. Do you know who did that?

A. Well, the book might have been torn.

Q. Right where that date should be alongside that charge to Holmes that date is torn out. Do you know who did that, sir?

A. Well, that is my partner's entry here.

Q. Do you know who tore it out, that date there?

A. No, I do not.

Q. You don't know who tore it out?

A. No, sir; it is not tore out; I don't think it was ever tore out.

Q. You don't think it was ever tore out?

A. No, sir.

Q. Don't you think the bottom part of that J was torn off after it was made?

A. No, sir; I don't; not any part of it.

Q. Not any part of that J was torn off after it was made; that is what you swear to?

A. Yes, sir; the date is right above it and it is dated the same time.

Q. Well, now, sir, the last date above on that page, is not
354 that a figure two that has been kind of blurred—scratched
out purposely?

A. No, sir.

Q. You think that is a figure one?

A. I don't know now; I will tell you now as I spoke to you before. Here you notice date of October 29th; here is October 30th; he came in here with a rig.

Q. I am asking about this date here.

A. Yes; these dates are all the same way.

Q. You think that date is only blotted?

A. Well, I don't know; that is my partner's date.

Q. That undoubtedly was put in there before you made the entry on the lower part of the page, that one?

A. Here (indicating)?

Q. No, sir; that is November.

A. Well, that probably was the same date as this.

Q. You think that that is a 2, don't you?

A. Here is Nov. 2d.

Q. Don't you think that is Nov. 2d also?

A. I don't, because there is November below it.

Q. Where is November first below it?

A. Here is November first; you take notice, that probably answers.

Q. That is November first put in the page. We are talking about another place. When was that put in?

A. At the time the charge was made.

Q. You think the book has been torn—since November first has been torn?

A. That book has not been touched in nearly a year.

Q. This accident occurred more than a year ago. Why was not that November first put in there as the other is?

355 A. I don't know; it is my partner's writing.

Q. You don't know how it happens?

A. No, sir; I cannot say. There has nothing been torn or destroyed; no dates, I will assure you.

McNaught: We have no objections to the book going in evidence.

(Book introduced in evidence.)

(Jury inspected the entry in book.)

Continuation of direct examination:

Q. Do you remember, Mr. Nelson, what the condition of this right of way was along here at the time Holmes was injured, along in here (indicating between White's saloon and crossing), as to its being low or high?

A. Well, it has been graded up since then.

Q. Has it been graded up in here (indicating)?

A. It has been filled up some.

Q. How much has it been filled up?

A. Well, I should judge six to eight inches.

Q. Do you know a Mr. Brunsen, a young lad about 16 years old, at Sprague?

A. Yes; I know him by sight.

Q. Did you know him about the time of this accident?

A. I did not.

Q. State, Mr. Nelson, whether or not you were standing in such a position as you could see or have seen the end of this colliding train at the time it was down in this situation anywhere (indicating).

A. Yes; I could.

Q. State whether you saw anybody on the end of the caboose, the west end of the caboose. 356

A. No, sir; I do not think there was any one. If there was I would have been very apt to have seen them.

Q. You would have seen them?

McNaught: We object.

Q. You said you would have been very apt to have seen him?

McNaught: We object.

Q. State whether, Mr. Nelson, you saw any one get down off from the west end of the caboose and run out in front of Holmes' team at or just before the collision.

A. No, sir; that would have been impossible.

Cross-examination.

(By **McNaught**:)

Q. Did you see anybody at all between you and where the freight-house or the cars — when you were standing there?

A. I saw some men there.

Q. Who were they?

A. I could not tell you.

Q. Did you see anybody between you and these box cars standing on the side track

A. I don't think there was any one standing there.

357 W. R. **Skelton** recalled.

(**Andrews**:)

Q. Do you know what the condition of the ground was along in here at the time of the accident to Holmes *was* as to its being high or low (indicating ground between White's saloon and the place of accident)?

A. That ground br*ake*s down a little. It kind of swags to the crossing. Back in here there is a kind of a pond of water in there, then it kind of raises a little and then drops a little again just about this crossing.

Q. State whether that place where the pond of water was has been filled.

A. It has been. I don't know whether it has been entirely. It has been filled some.

Q. How much has it been raised there?

A. From the time I went there I think it has been filled in at least six inches or a foot.

Q. Were you standing in a position at the time the accident occurred that you could have seen a person at the west end of the caboose at the time it was approaching the crossing?

McNaught: We object.
The **Court**: Objection overruled.
McNaught: We will except.
The **Court**: Exception allowed.

A. I was in a position that I could have seen any one on the end of the train.

Q. Which way were you looking at the time?

A. Right towards the train from this position in that direction.

Q. Did you or did you not see any person get down off the end of the caboose on that occasion and run across the track in
358 front of Holmes' horses down beyond that west switch?

A. No, sir; I did not see any one move off the train; in fact, I don't think there was any one on the hind end of the train.

(**McNaught**:)

Q. Are you the same Mr. Skelton that testified in this case last term?

A. I suppose I am.

Q. You testified last term, I believe, that the train was running 25 miles an hour at the time of the collision?

ANDREWS: He has examined the witness as to what he testified to.

McNAUGHT: I want to test his recollection.

COURT: I think you have examined him once about this.

Q. You stated, Mr. Skelton, I believe, along here (indicating), from this crossing along in there, that it had been filled in since the time you have been there six inches or a foot.

A. Since the time I first went there, the north side of this street, the grade is inclined. There used to be a pond of water next the track. As you would leave that there would be a little rise in the ground slightly this way, and then incline again towards the crossing.

Q. You think, along in there, there has been a raise of six inches or a foot?

A. It has been gradually filling in.

Q. How long have you been in that town?

A. Three years, I think, since last April.

359 A. RICKETT, recalled.

(ANDREWS:)

Q. Were you in such a position at the time the accident occurred that you could have seen any person on the west end of the caboose just prior to the accident?

A. Yes; I think I could have seen any person on the end of that caboose.

Q. Did you see any person get off or on the west end of that caboose that day?

A. No, sir; I did not.

Q. At the time of the accident did you see any person get off from there?

A. No, sir.

Q. Did you see any person run across in front, over the crossing, in front of Holmes' team down across to the switch?

A. No, sir; there was nobody, I don't think, run in front of the team at the time of the accident.

Cross-examination:

(McNAUGHT:)

Q. That is you recollection now?

A. That is my observation. I was looking right in that direction.

360 TH. SMITH recalled.

ANDREWS:

Q. Have you examined this plat?

A. Yes, sir—that is, I looked at it this morning.

Q. Is that a correct plat of Railroad street in Sprague with reference to distance of this track from the main track?

A. I don't know that it is exactly.

Q. What is the distance from the main track here on the crossing of this street to the corner of this lot?

A. I could not say exactly how far it is. I think, though, from the division between the two tracks, there is 50 feet from the main line.

Q. Were you in Sprague on the first of November, 1883, or about that time?

A. I was there about that time.

Q. Do you know the condition of this body of land lying up in here from White's saloon down towards railroad crossing?

A. Yes; pretty well.

Q. Do you know whether it is — the same condition or not now as it was then with reference to being high or low?

A. Well, there is a part of it that has been filled in.

Q. Just *ap*point to the jury what has been filled in?

A. On that lot on the corner by the Bon Ton saloon there has been dirt taken out and filled in the street.

Q. How much has been filled in?

A. I don't know how far down it comes. It has been filled in with the dirt that has been taken out here in order to build.

Q. About where has the dirt been put?

A. About twenty feet from the corner. It has been dug in order to set a hotel there. Dirt has been run out, most of it, in front
361 on the street and has raised part of the street considerably.

Q. Was that dirt thrown in the low places?

A. One of the low places was in front of the lot. It was run out in front. I don't think it was anywhere except in front of that lot. It was kept about in front of that lot.

Q. How far down was it, do you remember?

A. I could not say how far.

Q. Point to the jury about the place that you think was filled.

A. I think half way across the street, anyway; maybe more.

Q. I would like to ask you if you saw the accident to Holmes?

A. Well, I saw it; yes.

Q. Where were you standing?

A. I was standing about there, just in front of that vacant lot.

Q. Were you at the time looking at the rear end—the west end—of the train?

A. No, sir.

Cross-examination:

(McNaught):

Q. In reference to these tracks and location here, do you know the distance between these by measurement?

A. No, sir.

Q. You would not pretend to say that this map was drawn on a scale and this distance given on the map is correct?

A. Well, I don't know what track this is. I don't understand that track as leading down here into the round-house. There must be a track yet still south of that.

Q. Does not the track that ruus still south run off around this
point, just touching the corner? Suppose that is the master me-
chanic's shop right there, and that other track comes out
362 along here, then would not that be a second track? Would
that not be the correct location of it?

A. Well, I think not; hardly.

Q. Where do you think it ought to be?

A. A little higher up.

Q. Did you ever measure it?

A. No, sir.

Q. That is just your idea of it as you now recollect from the situation down there. This dirt you speak of thrown in front of this lot, do you know whether or not that comes down and covers the road or whether it just extends to the road?

A. Well, I don't know exactly which way they travel, whether they travel over it or below that. It comes down about half way on the street.

Q. Don't you know whether it comes so as to cover the road; that is fresh dirt so it will show for itself?

A. It has been taken out lately.

Q. Piled up the width of the lot and extends out into the street a little?

A. Yes, sir.

363 Ed. Peterson recalled.

(Andrews:)

Q. Did you know the condition of the ground along on the north side of the crossing of B street about the time of the accident?

A. Yes, sir.

Q. Has there been any change in the elevation in the ground since the accident? Has any dirt been put in?

A. On the street?

Q. Yes, sir.

A. Yes, sir.

Q. When was it put in?

A. About two months ago.

Q. How much was put in?

A. I don't know how many loads.

Q. How much would it be raised?

A. Raised about three or four foot I guess, maybe more.

Q. Where were you standing at the time the accident occurred?

A. Right on the crossing.

Q. Wnere? Just point it out to the jury.

A. I don't understand this map exactly.

Q. Suppose this to be the crossing in here, that the planking, that the freight-house, etc., where were you standing?

A. Right at the crossing there.

Q. Which way were you looking?

A. Just nearly facing the horses, looking right after the train to come down.

Q. Did you see anybody on the west end of the caboose as the train came down?

A. No, sir.

364 Q. Were you in such a position that you could have seen any one if they had been there?

A. Yes, sir.

Q. Did you see any one run across in front of Holmes' horses just before the collision occurred?

A. In front of Holmes' horses?

Q. Yes, sir.

A. No; I did not.

Q. Would you have seen or could you have seen any one if they had been there?

A. I could have seen them if he had run in front before the car struck him.

Q. What do you say as to whether or not there was such person there running in front?

A. I did not see them.

Cross-examination.

(By McNaught:)

Q. Now, you say, Mr. Peterson, these are the box cars; that you were standing right here on this dead track—right west of the box cars—at the time when this collision occurred?

A. Yes; that is the freight-house.

Q. This is the planking, and you were right on the west edge of that planking and on this dead track?

A. Yes, sir.

Q. That is where you were standing at the time?

A. Yes, sir.

Q. Now, this dirt you speak of having been thrown in there, suppose this is B street and that is where they are putting that new building up; this dirt you speak of was being thrown out in front of it?

365 A. That is the second lot.

Q. That is where the dirt is thrown out?

A. Yes, sir.

Q. That shows that it is new dirt at this time, does it not?

A. Yes; it was only thrown out there in the last two months.

Andrews: How far in the street does that dirt reach—that is, that is thrown out from that hotel?

A. Pretty near half; I don't think it goes half way.

Q. But it reaches pretty near half way?

A. Pretty near, I guess; I gave it no attention.

366 T. S. ROADMAN, a witness for plaintiff, sworn.

(By Mr. ANDREWS:)

Q. Are you the same T. S. Roadman who was attorney for Mr. Holmes in this case?

A. Yes, sir.

Q. State to the jury whether you have any connection with the case at the present time.

A. No, sir.

Q. Have you any interest in the result of the suit?

A. Well, I can't say that I have.

Q. Mr. Roadman, do you know Mr. Blackwell, the locomotive engineer?

A. Yes, sir.

Q. Did you ever have any conversation with him in reference to the ringing of the locomotive bell?

McNAUGHT: We object. The question was not put to Blackwell whether or not he had a conversation, but was put to Mr. Winnie as to whether or not he had a conversation.

The COURT: You are bound by his answer if you don't fix the time or place.

ANDREWS: We offer in evidence the plat from which the witnesses have testified.

ANDREWS: Plaintiff rests.

367 Defendant offered the following:

Mr. MALONEY recalled:

Q. In taking your observations on Sunday and driving around from White's saloon I will ask you as to whether or not in driving your carriage around if you passed over any of this new dirt placed in front of this new building up here.

ANDREWS: We object. We do not think that is explanatory of our testimony or rebuttal.

The COURT: You have proved one particular change and he wants to re-examine concerning it.

McNAUGHT: We desire to prove under our experiments that we did not pass over any of that raised ground.

Q. State what the fact is as to that.

A. No, sir; I did not pass over that new dirt; that new dirt does not extend into the common-travelled road through the street.

Cross-examination.

(ANDREWS:)

Q. Point out on the plat the route that you travelled.

A. From what point? We traveled about the middle of the street; used the road as it runs around.

Q. Just point with the pen where you traveled.

A. This represents the street; this is the edge of the sidewalk.

Q. Yes.

A. And I think this is the lot White's saloon is on.

Q. That building is on lot nine.

A. This is the mark of the edge of the lot. We came right along down here.

Q. Take this pencil and mark on that plat just where you come.

A. I stated I traveled about the center of the street.

368 Q. Mark on that paper——

A. If the court instructs me to.

McNaught: Mark as near as you can.

A. Well, it is about the centre of the street. That is all the mark I can make.

McNaught: I have but one more witness, and that is to prove the exact measurements of this man, and then we desire to rest. We desire to move the court, as soon as the testimony is all closed, to take the jury and go to Sprague and inspect the premises, and we desire to say to the court and counsel that while there inspecting the premises that we desire — put a train on made up precisely as it was made up on that day and in the positions testified to by our witnesses who made the experiments. We desire to do this, if your honor please, so that the jury may see what we claim the plaintiff could have seen, so that there can be no mistake in this case as to what he could have seen and could have heard on that occasion.

The Court: What do you say to that proposition?

Andrews: I think it is within the discretion of the court, and if your honor feels that it will result in a demonstration of the truth I have no objection whatever that the order be made. I have no serious objection to it.

The Court: I think there is some conflict as to what could and could not be seen and that a view would aid the jury, perhaps, in arriving at a conclusion on the subject.

369 John B. Slater recalled.

(McNaught:)

Q. Do you know who was receiving freight and doing a draying business in Sprague on the day the accident occurred to Mr. Holmes?

Andrews: I do not think that is proper in serrebuttal.

McNaught: Simply to the fact that they have introduced a certain person and claim to show by a book that the date has been fixed.

Andrews: Our evidence was all rebutting. They were hedging on this question of date all the time. The testimony of Blackwell shows it. The testimony of the defendant shows that it was about the first of November.

McNaught: We object to counsel making such a statement as that.

The Court: I think this question as to date is properly new matter.

Q. State if you remember who was draying in Sprague on that day.
A. I am not prepared to say who was driving a dray or running the dray at that time.
Q. Did you deliver any freight to any person on that day if you remember?
A. Yes; I delivered freight on that day.
Q. To whom?

Andrews: We object.
The Court: Objection overruled.

A. I am not prepared to say now to whom I delivered freight to. If I had the delivery books of the N. P. R. R. Co. probably I could.
Q. I will ask you a leading question: Immediately after the collision did you see David Vinyard at or near the place where the collision occurred?
A. No; I did not see Vinyard at or near.
Q. Did you see him at all?
Q. I saw him a short time after the collision.
Q. Where?
370 A. He was in the warehouse.
Q. Which; the freight warehouse?
A. Yes, sir.
Q. Where you were at work at that time?
A. Yes, sir.
Q. How do you remember the fact that he was there?
A. Because he told me about the accident.
Q. The accident to Holmes?
A. Yes, sir.
Q. How soon after the collision occurred was that conversation between you and Vinyard?
A. To the best of my recollectien it was inside of five minutes.

The Court: Are you both through?
McNaught: We rest.

The Court: Gentlemen of the jury, we will now take our noon recess, but instead of reassembling here the jury will assemble at the depot at 15 minutes after 1, and the train will be there to convey them to Sprague with the court and officers for the purpose of viewing the scene of this accident. You will bear in mind the caution I have heretofore given you.

(The jury and court were taken to Sprague and viewed the place where the accident occurred and witnessed the different experiments with the train and cars as testified on by witnesses from the different positions mentioned in said testimony.—Reporter.)

371 That the view and all the observations made by the jury of the place where the accident to the plaintiff referred to in the

complaint and testimony of witnesses occurred were made at the express instance and request of defendant's attorneys and a series of observations were so made under the same circumstances as near as might be as testified to by *by* different witnesses of plaintiff and defendant, and the jury were driven in a wagon of about the same height as the buggy plaintiff was riding in at the time of the accident, as shown by the testimony, over the same ground and in about the same course as plaintiff drove at that time and at as nearly the same rate as might be, and during such time a train made up like the one that collided with plaintiff's wagon was operated by the defendant in the different ways described by different witnesses of plaintiff and defendant, and the jury were directed at the request of both parties to observe the result of such hypothetical experiments and to note the results of such observations and experiments, and counsel on both sides, in their argument to the jury, referred to such observations and experiments and claimed that such observations and experiments viewed by the jury contradicted other testimony in the case.

372 After the introduction of said testimony and arguments of the counsel to the court and jury the court of its own motion instructed the jury as follows:

JAMES HOLMES, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Charge of Court.

I. The plaintiff was injured by a collision between a train of cars owned and operated by defendant and a carriage in which the plaintiff was riding upon a crossing of defendant's line of railway in the town of Sprague, which it is claimed was a public highway. It is averred in this complaint that this collision occurred through the negligence of the defendant, and the plaintiff brings this action to recover damages therefor.

The negligence of the defendant consists, as averred in the complaint, in pushing its train of cars down upon the crossing with rapidity and in failing to give warning of the approach of its train The further allegation of negligence is made that defendant constructed a building near said crossing abutting on said highway which obstructed the view of the railway track eastward to a person approaching the crossing from the north, as plaintiff was, and that the view eastward was further obstructed by a number of box cars which had been left standing near said crossing. As to the last averments of negligence mentioned, if there is no proof of the 373 negligence of the defendant in other particulars averred, the plaintiff cannot recover. Whether or not the view of the train of cars with which plaintiff collided was hidden from him by a building and by the box cars in front of the building wholly or partially, and, if partially, to what extent, are questions which are important as showing the degree of care necessary to be used both by plaintiff and defendant in approaching the crossing, but negligence of the defendant causing the injury that plaintiff received cannot, in my opinion, be predicated upon them.

2. Upon the question as to whether the defendant, by its servants, pushed its train down upon the defendant with such speed as to constitute that an act of negligence, and as to whether it failed to give warning of the approach of its train and was guilty of negligence therein, I instruct you that the defendant was bound to use such care in pushing its trains over the public highways in the town of Sprague as men of common prudence and intelligence would ordinarily use under like circumstances, taking into consideration the frequency with which the crossings were used by the public, the difficulties by reason of the situation and surroundings of the crossings in avoiding collisions and the results likely to ensue from collision, and that the absence of such care by the defendant in this case would make it guilty of negligence, for which the plaintiff may recover if he was injured thereby.

3. What would be a rate of speed that a man of common prudence and intelligence would feel to be a safe one at the particular time and place when and where this accident occurred, and whether the train of cars was pushed at such a rate at the time of the 374 accident, as well as the question whether a man of common prudence and intelligence would deem it safe to push a train of cars with a locomotive at said time and place without giving warning of the approach of the train by ringing the engine bell or blowing the engine whistle or by some other adequate means, and whether such warning was given, are questions of fact for you to determine from the evidence in this case.

4. What was the situation of the crossing; was it used by the public with frequency; was there anything about it rendering accident likely or probable; was there anything in the nature of the machinery used in operating a train of cars to render an accidental collision of serious consequence? It will be your duty to determine these questions from the evidence and to reach a conclusion therefrom as to what common care and prudence would require in the management of a train of cars such as the evidence shows this train to have been at the time and place when and where the accident occurred and whether the defendant exercised such care and prudence.

5. You should bear in mind, however, that the plaintiff can recover for the absence of due care in the particulars averred in his complaint only. Absence of such care in other respects than as averred cannot be considered by you. In applying what I have said to you on the subject of negligence of the defendant to the facts of this case it is necessary for you to determine from the evidence two other questions:

1. Was the place where the accident occurred within the defendant's switch-yard?

2. Was it upon a public highway crossing the track of the defendant's railroad?

375 6. Although the accident may have occurred at a place within the defendant's switch-yard, yet if it was upon a public highway crossing said yard, then the defendant would be liable for failure to use the degree of care in approaching said highway with its train that I have indicated. If it was within the defendant's switch-yard, but not upon a public highway, then the defendant would not be liable at all upon the case made here by the plaintiff. You are to determine from the evidence whether this place where this accident occurred was or was not a public highway. If the defendant threw it open to the general public as a crossing and permitted the public to use it continuously for a number of years up to the time of the accident as a crossing and by grading, putting down planking, and by other acts indicated its nature as a crossing, held it out to the public as such, then you would be justified in finding that the crossing was a public highway within the meaning of the law.

7. The burden of proving negligence rests upon the party alleging it, and where a person charges negligence on the part of another as a cause of action he must prove the negligence by a preponderance of evidence. Preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of evidence is the jury should take into consideration the opportunities for seeing or knowing the particular things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements in view of all the other evidence, facts, and circumstances proved upon the trial, and from all these circumstances determine upon which side is the weight or preponderance of the evidence.

376 8. If, however, the witnesses who testify differently to the same facts are all of them of equal candor, fairness, intelligence, and truthfulness and equally well corroborated by all the other evidence and are upon an equal footing as to interest in the result of the suit, then the preponderance of evidence as to that fact would be determined by the number of witnesses.

9. In determining the questions of fact in this case the jury are at liberty to disregard the statements of all such witnesses, if any there be, as have been successfully impeached, either by direct contradiction or by satisfactory proof of having made different statements at other times concerning material facts, except in so far as such witnesses have been corroborated by other credible evidence or by facts or circumstances proved on the trial and except where the statements made out of court different from those made in court are admitted by the witnesses themselves and the reasons therefor satisfactorily explained.

10. In determining whether a fact has been established positive evidence from credible witnesses is of more value than negative evidence. Positive evidence is that given by a witness who testifies to seeing or hearing a particular thing at a particular time and

place. Negative evidence is that of a witness who testifies that at a certain time and place he did not see or hear such things, but if a witness testifies that he looked for a certain thing to occur, having the means to see, and it did not occur, or that he listened for certain sounds, being in a position to hear, and that no sound was made, then his evidence as to such matters is positive and not negative.

377 11. The law makes the plaintiff a competent witness in this case, but the jury have a right to take into consideration his situation and interest in the result of their verdict and all the circumstances which surround him and to give his testimony only such weight as in their judgment it is fairly entitled to.

12. The jury have no right to disregard the testimony of any of the defendant's witnesses through caprice or without cause, merely for the reason that they are in the defendant's employ. Their credibility is to be judged of precisely as the credibility of the other witnesses in the case. The jury may look at this fact, however, in connection with all the other circumstances in evidence bearing upon their credibility and the facts testified to by them as a circumstance to be considered in weighing their evidence.

13.. Weighed by the rules that I have here indicated, if you find that the weight of the evidence upon the question of negligence averred in the complaint is in favor of the defendant or that it is equally balanced, then you should find for the defendant.

14. If you find that the defendant was negligent, as averred in the complaint, then you must go one step further and inquire if the plaintiff was guilty of negligence that contributed to the accident. If he was so guilty he cannot recover. The degree of care, the absence of which would constitute negligence on the part of the plaintiff, is the same as that imposed upon the defendant, namely, such care as a man of common prudence and intelligence would ordinarily use under like circumstances. The care required of him was proportioned to the danger and peril which the crossing involved. If the place was dangerous and the approach to it by a train obscured he should have proceeded with more caution and circumspection than if the crossing were in an open country and
378 not ventured on the track without the use of the means that common prudence would dictate to ascertain that no train was approaching.

15. Greater care would be required of him if he knew that a train was then approaching the crossing or about to approach than if the contrary were the fact. The rights, duties, and obligations of railroads and travelers upon intersecting highways are mutual and reciprocal, and no greater degree of care is required of one than the other. The railway train has the right of precedence in crossing, but this right does not impose upon the traveler in a wagon the whole duty of avoiding collision. It is accompanied with and conditioned upon the duty of the train to give due and timely warning of approach. The duty of the wagon to yield precedence is based upon this condition. Both parties are charged with the mutual duty of keeping a careful lookout for danger, and the degree of dili-

gence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty.

16. If at any time before the plaintiff put himself across the track of the approaching train he was in a position where he could have seen the train moving towards the crossing well enough to understand its movements and to avoid collision with it, but carelessly drove across the track without looking to ascertain its movements, then he was guilty of contributory negligence which would prevent him from recovering in this action.

17. If you find that the train was giving warning of its approach to the crossing, and that plaintiff heard the warning or could have heard it by listening attentively or by any other expedient that would suggest itself to a man of common, ordinary prudence, then if he drove upon the track without adopting any such expedient he would be guilty of contributory negligence.

379 18. The testimony of the plaintiff shows that he started in his carriage from White's saloon, a place some two hundred or more feet from the crossing, in order to drive over the crossing. The defendant claims that the plaintiff could have seen the moving train at all places between White's saloon and the immediate vicinity of the crossing. You will recall the testimony on this subject and recollect the observations made by you on the ground and determine what the fact is. If the train was moving towards the crossing at the time when plaintiff drove down from the saloon to the crossing and the plaintiff could have seen it so moving if he had looked and he carelessly failed to look, then the fact that his view was obstructed at the point of immediate crossing does not relieve him from the consequences of his failure to look when he might have looked — he would not be entitled to recover.

19. If you believe that the plaintiff on the day of the accident had been indulging in the use of intoxicating liquor, and that he was then under its influence to any extent, you may consider this fact in connection with all the other circumstances of the case to determine whether or not he was guilty of contributory negligence.

20. Unless the plaintiff has shown by his own evidence that he was guilty of contributory negligence, then the burden of showing such contributory negligence is on the defendant and it must be shown by the defendant to the same extent that plaintiff is required to show the alleged negligence of defendant.

21. If your verdict should be for the plaintiff it will be your duty to determine the damages that he is entitled to recover.

The plaintiff avers in his complaint that he has expended sums of money for medicines and the attention of physicians by reason of the injuries received at the hands of the defendant, and that his injuries are of such a nature that he will always be com-
380 pelled to be at expense to secure medical attention and medicines. The evidence tends to show that he has expended considerable sums in the past for medicines and medical attention, but does not show or tend to show that he will be required in the

future to be at expense for that purpose. Therefore if you find that he is entitled to damage in this case you will be permitted to allow him as this source of damage the sums only heretofore expended by him.

22. The plaintiff claims that he was a carpenter and joiner at the time of his injury and competent and able to work at said employment, but that since his injury he has been wholly unable to work at his trade and always will be unable to so work during the balance of his life or to engage in any other mental and physical employment.

23. In estimating damages by reason of deprivation of ability to work since the accident and up to this time the plaintiff would be entitled to an amount that would reimburse him for what he might have earned by working at his trade during said time, if you find that by reason of the injury to him he was prevented from so working or from working at any other employment. If he might have worked at other employment he would be entitled to what he might have earned at his trade less what he might have earned at the other employment.

24. In considering the question of the amount of damages to which the plaintiff may be entitled by reason of inability to work in the future, if he is entitled to damages at all, it will be necessary for you to consider whether his injuries are permanent or temporary, whether the disability to earn a livelihood is total or *u*nly
partial, how long the plaintiff is likely to live, and if his
381 *his* inability be partial and not total to what extent it impairs his capacity to earn money.

25. Such sums should be allowed him as, put at reasonable interest, will make a sum at the time of his death, by adding together principal and interest, equal to the sum which you believe he could have earned but for the injury. This sum will be more or less, as you believe his injuries to be total or partial, permanent or temporary, and will depend in either event upon the conclusion that you will arrive at from the evidence as to the probable duration of his life.

26. The plaintiff also claims damage by reason of the pain and mental an*q*uish suffered and yet to be suffered by him from the injury. If you find from the evidence that he has so suffered in the past and will be compelled to suffer yet further in the future, this is a proper matter to take into consideration in estimating his damage. The law does not fix a standard by which this source of damage may be gauged, except that the allowance therefor must be such sum only as the jury, considering all the circumstances dispassionately, will consider to be a fair and reasonable allowance.

27. He cannot in any event recover more than he has claimed in his complaint, which is twenty-five thousand dollars.

The law requires you, gentlemen of the jury, to consider this case upon the testimony fairly and impartially under your oaths as jurors. Sympathy for the plaintiff by reason of his age and infirmities would be misplaced if it induced you to stretch your consciences to find a verdict for him if he was not entitled to a verdict.

Bias or prejudice against the defendant by reason of its corporate
382 character would be criminal if it induced you to regard
its rights in this cause less favorably than if the defendant
were a private individual. You should forget, as far you can, who
the parties to this cause are and try it as if both of them were entirely
unknown and indifferent to you, and in the end to reach a
verdict which your consciences can approve. If you find for the
plaintiff your verdict will be in the form following, &c.

383 Defendant's counsel then and there excepted to the giving of said instructions by the court numbered 2, 3, 6, 8, 10, 15, 16, 18, 19, 25, and 26 and each subject-matter contained in each of said instructions, and the court then and there duly allowed said exceptions.

That the court, at the instance of the plaintiff, gave the following instructions:

384

Excepted to by defendant.

No. 1. No particular form or ceremony is necessary in the dedication of land for a public highway. All that is required is that the owner shall in some manner manifest an intention to dedicate it, and that the public shall accept the dedication.

*F*iven.

Excepted to by defendant.

No. 2. No specific length of possession by the public is necessary to constitute a dedication of ground as a street or highway. It is only necessary that the owner should manifest an intention to dedicate it for that purpose, either by writing, by declarations, or by acts, and that the public should accept the dedication as made.

Given.

Excepted to by defendant.

No. 3. Both parties are bound to exercise such
care as, under ordinary circumstances, would
avoid danger; such care as men of common
prudence and intelligence would ordinarily use
under like circumstances. The amount of care depends on the risk
of danger. If you find that the plaintiff's view was obstructed, so
that he could not see the approaching train, the exercise of greater
care and caution would be required on both sides, as well on the
part of those having the management of the train as of one crossing
the railroad. Those having the management of the train should
approach the crossing at a less rate of speed and use increased
385 diligence to give warning of their approach, and if the train
was an irregular one it is still more incumbent upon them in
going over such a place to slacken their speed and give sufficient
warning.

Given.

No. 4. The plaintiff and defendant had an equal right to the crossing in question; the plaintiff for the purpose of passing along the highway across the defendant's road, and the defendant to pass its trains along over its road across the highway. In the exercise of this right both were bound to use ordinary care to prevent an injury either to the other or himself, and, further, to do nothing which would interfere with the full exercise of this care by the other. This instruction is open to the following limitations:

The train, by reason of its ponderous weight, is entitled when under way to the right of passing over the crossing first, but if the defendant's employees having the control and management of the colliding train had notice of the plaintiff's intention to pass over the crossing, and the plaintiff was using reasonable diligence to accomplish that purpose, and was attempting to accomplish it, and was at the time that the motion of the train was reversed and its movement west begun in dangerous proximity to the crossing, then the defendant had no right to send the train back, upon, or over the crossing until the plaintiff had had a reasonable opportunity of passing over.
386

(In doubt. Not given unless plaintiff shows that such negligence is averred in complaint.)

No. 5. The plaintiff was only bound to the exercise of that degree of care and caution in approaching the crossing as men of ordinary care and prudence would reasonably be expected to exercise under the same circumstances, and, in considering whether he was guilty of a want of such care and caution, you may consider whether the conduct of defendant's employés or of others about the crossing and the fact that the train had recently crossed the street in the opposite direction from that in which it was moving at the time of the collision, or any other facts which you may find proven by the evidence, would naturally tend to mislead a person of ordinary prudence into the belief that the crossing was safe and did mislead the plaintiff into such a belief, you may consider these facts and circumstances as tending to exonerate the plaintiff from the charge of contributory negligence.

Excepted to by defendant.

Given.

When a party is compelled to choose upon the instant as to the proper or safe course to pursue in order to avoid a threatened hazard, the fact that his choice may have been a mistaken one will not prove contributory negligence on his part or deprive him of his remedy.

Given.

387 While, as a general proposition, the testimony of witnesses that a certain fact occurred is entitled to more weight than the testimony of witnesses that they did not see or hear, yet the circumstances under which positive testimony is given may be such as to rightfully lead you to the belief that the negative testimony was the more credible of the two.

To apply this proposition to this case, witnesses on behalf of the the defendant have testified that the bell on the locomotive was ringing. Some of the witnesses for plaintiff have testified that they were in a position to hear the bell and could have heard it if it had been ringing, and that they did not hear it ring.

Excepted to by defendant.

Although this negative testimony is not of as conclusive a character as that of positive testimony to the effect that the bell was ringing, yet such negative testimony is often the best that a party is able to produce, and it is your duty to consider such testimony for what it is worth.

Given.

388 James Holmes
vs.
Northern Pacific Railroad Company.
Instructions asked by Plaintiff.

If, under the instructions given, you find from the evidence that the plaintiff is entitled to recover, you will then consider the various elements of damage that should enter into the composition of the verdict, and they are as follows:

I. Physical and mental pain.

II. Loss of time and diminished working capacity.

III. Expenses for surgical and medical aid and nursing.

IV. The length of time, if at all, through which these elements of damage may have already operated upon the plaintiff and the length of time, if at all, through which they will probably continue to operate upon him.

Refused.

389 That defendant's counsel then and there excepted to the giving of instructions numbered 1, 2, 3, 5, 6, asked for by the plaintiff's counsel as aforesaid, and each subject-matter thereof, and the exceptions were then and there by the court duly allowed.

That the defendant's counsel asked the court to instruct the jury as follows:

390 In the District Court Holding Terms at Cheney, Spokane County, W. T.

James Holmes, Plaintiff,
vs.
Northern Pacific Railroad Company, Defendant.
Instructions asked by Defendant.

I.

Excepted to by Andrews & Jones, att'ys for pl'tff.

Before the plaintiff can recover of the defendant for the injury alleged in the complaint, the plaintiff must show that the defendant was guilty of some degree of negligence which contributed to the injury.

Given.

II.

Excepted to by defendant.

If it appears from the evidence that the plaintiff is not entirely free from any degree of negligence which contributed to the injury, then the plaintiff cannot recover in this case, notwithstanding you may find that the defendant is guilty of some degree of negligence which contributed to the injury.

Refused; misleading.

III.

Excepted to by defendant.

If there was any negligence on the part of the defendant and plaintiff which contributed in any degree to the accident, the jury have no right to strike a balance between them so as to find a verdict for the plaintiff, but in such case you must find for the defendant.

Refused; misleading.

391

IV.

Excepted to by Andrews & Jones, att'ys for pl'tff.

Ordinary diligence is the exercise of that care which every person of common prudence bestows upon his own affairs or concerns. And the man of common prudence bestows the highest degree — vigilence and care upon his own affairs when danger of his life environs him and he apprehends an impending disaster. The plaintiff in this case was bound to use that degree of care, and if by that degree of care on his part the injury might have been avoided he cannot recover in this action.

Given.

V.

Where negligence is the issue, as in this case, it must be a case of unmixed negligence to justify a recovery, and if both parties by their negligence contributed to the injury, then neither can recover against the other.

Given.

VI.

Excepted to by defendant.

If the view of the track was obstructed by the building called depot, mentioned in the pleadings, and the cars adjacent thereto on the side track, as claimed by the plaintiff, to his knowledge, common prudence should have dictated to him to approach the track cautiously and not to venture upon it until he had ascertained that no train was approaching. The situation of the building and cars did not diminish the degree of care required of plaintiff in the slightest,
392 but it increased his duty of greater carefulness. He was bound to exercise care, dilligence, and foresight in proportion to the danger to be avoided and the fatal consequences involved in neglect.

Refused.

VII.

Every person is bound to know that a railroad crossing is a dangerous place and he is guilty of neglect unless he approaches it as

Excepted to by defendant.

if it were dangerous. If you find from the evidence that the plaintiff was acquainted with the place where the collision occurred, and also find that said place was within the switching yards of the defendant, and also find that the defendant did not have a regular time for switching in said yard or was moving its trains at any time whenever business required therein, and that the plaintiff knew such to be the practice of the defendant, then the plaintiff was bound to know that a train might be approaching at any time, and if he attempted to cross said track without ascertaining whether one was coming or not, but on the contrary drove directly onto the track and the collision resulted, he was guilty of contributory negligence and cannot recover in this action.

Refused.

393

VIII.

Excepted to by defendant.

It is not the exercise of ordinary care and prudence for a person to drive a team directly onto a railroad crossing, known to him at the time to be dangerous, without making any effort by stopping and listening or otherwise to ascertain whether a train is approaching or whether it is safe.

Refused.

IX.

Excepted to by defendant.

If you find that the building called the depot, mentioned in the pleadings, and the cars on the track adjacent thereto so obstructed the view of the plaintiff that he could not see the train, this fact called him to a greater care and watchfulness in driving upon the track than if the view wasopen, and if in the exercise of ordinary care and vigilence the plaintiff could have heard the noise of the coming train and then drove upon the track without first fully ascertaining that there was no danger of collision, then he was guilty of negligence and cannot recover in this action.

Refused.

X.

Excepted to by defendant.

If you find that the place where the collision occurred was within the switching yard of the defendant, and that the business of the defendant required it to run trains at any or all times in said yard, and you further find that the said depot building and cars adjacent thereto so obstructed the view that the plaintiff could not ascertain by looking and listening whether or not the cars were being
394 moved in said yard by the employés of the defendant in the usual course of business, then it was the duty of said plaintiff to stop his team, and if he could not otherwise ascertain whether cars were being moved and approaching the crossing, then it was his duty to go in advance of said team so as to ascertain whether or not he could cross with safety.

Refused.

XI.

It is not averred in the complaint of the plaintiff that there was negligence of the defendant in locating the building mentioned in the complaint at the place where the same was constructed, and I charge you that the defendant was not guilty of negligence in locating and constructing said building where the same is or maintaining the said building after its construction at said point.

Excepted — by the plaintiff. Andrews and Jones, att'ys for plaintiff.

Given.

XII.

And, further, I charge you that if you find that the cars mentioned in the pleadings and charged by the plaintiff to have been negligently left upon defendant's track adjacent to said building were box cars such as the defendant usually carries freight in and were placed upon said side track adjacent to said building in the usual course of its business, then I charge you that the defendant had the right to place said cars there and was not guilty of negligence in so doing. 395

Not given. Covered by general charge.

XIII.

I further charge you that there is no law in Washington Territory requiring defendant to give signals, either by blowing the whistle or ringing the bell or otherwise, at any specified distance before reaching a street or public highway crossing.

Excepted to by plaintiff. Andrews & Jones, att'ys for pl'ff.

Given.

XIV.

I further charge you that it is not averred in the plaintiff's complaint that the defendant was negligent in not ringing the bell or blowing the whistle or giving other warning at a safe and proper distance before reaching the place where said collision occurred, and, although you may find that the defendant did not ring the bell or blow the whistle or give any warning of the approach of its train, I charge you that the defendant in this case cannot be held guilty of negligence in failing to give such warning.

Excepted to by defendant.

Refused.

XV.

And I further charge you that if you find from the evidence that the defendant did not ring the bell or sound the whistle or give other warning of the approach of its cars or train alleged to have collided with the carriage driven by the plaintiff, yet, should you believe from the evidence that the ringing of the bell or sounding of the whistle or giving other warning of the approach of the cars or train at this particular time would not have prevented the collision, the defendant was not guilty of negligence in such omission.

Excepted to by plaintiff.
396 Andrews & Jones, att'ys for pl'ff.

Given.

XVI.

There is some conflict in the evidence as to whether the defendant did give the warning by ringing the bell before reaching the place where said collision occurred, and the fireman, Johnson, testifies that he did ring the bill, and his testimony is supported by Blackwell and Vinyard. The plaintiff and other witnesses testify that they did not hear the ringing of the bell. The testimony of plaintiff and others who did not hear the bell rung is consistent with two things—one, that the bell was not rung, and the other that though rung it was not heard by them. Where one person testifies that he did ring the bell and others testify that they heard it their testimony is entitled, as a rule, to more credit at your hands than those who testify that they did not hear the ringing of the bell.

Excepted to by defendant.

Refused.

16½.

I therefore instruct you that you must find that the bell of the engine as it approached the crossing immediately prior *yo* the collision with plaintiff's carriage was being sounded.

Excepted to by defendant.

Refused.

397

XVII.

And I further charge you that if you find from the evidence that the defendant's servants or servant did ring the bell of the engine moving the train which collided with the plaintiff's carriage before said collision and while said train was at a distance sufficient to enable plaintiff to have stopped his team and avoided the collision and the plaintiff failed so to do, either for the reason that he did not hear the bell ring or, hearing, did not heed it, then you will find for the defendant in this case.

Excepted to by defendant.

Refused.

XVIII.

In crossing ordinary roads caution and care are chiefly demanded to avoid running against or over anybody else. In crossing railroads it is exacted to avoid being run over yourself. In the former case the blame attaches *prima facie* to the party doing the injury; in the latter it attaches in the first instance to the party obstructing the track, which would be the plaintiff in this case. Common prudence and common caution require every person approaching a railroad crossing, if he knows of it, to pause and see if he can cross in safety, and if there be any danger at all he is bound to wait until it is past, although there may be much practice to the contrary; still if he does not do this he does not exercise either common prudence or common caution.

Excepted to by defendant.

Refused.

398

XIX.

There are but two acts of negligence charged in plaintiff's complaint. The first one relates to the leaving of the cars on the side track adjacent to the freight-house. Concerning that I have instructed you. The other relates to the running of the train just prior to and at the time of the collision. It is averred in the complaint that the defendant negligently caused its train to be pushed rapidly along its track to the place where said collision occurred. There is evidence in this case tending to show that the planking at the place where said collision occurred is 28 feet in width, and that said planking is 33 feet in length, and that the box cars on the side track nearly abutted onto said planking; that the place where said collision occurred was on the south side of said planking; and it is claimed by the defendant that the plaintiff had an unobstructed view of the train which subsequently collided with plaintiff's carriage at the very moment and for a little time before the plaintiff reached within sixteen feet from the place where said collision occurred; and if you find from the evidence that the plaintiff could have seen said train by looking up or down the track at the time when said plaintiff was 16 feet or more from the place where said collision occurred and the said plaintiff failed so to do, then he was guilty of contributory negligence and 399 cannot recover in this case, notwithstanding you may find that the defendant negligently rapidly pushed its train down to said place where said collision occurred.

Excepted to by defendant.

Refused.

XX.

The defendant claims, and there is evidence tending to show, that the train was running so slow that the caboose which collided with the plaintiff's carriage did not move more than 25 feet after the collision, and that said train at said time of collision was not running to exceed 6 miles per hour; and if you find that the train had stopped within 25 feet after the collision and that it was not running at the time of said collision at a greater speed than 6 miles per hour, then you will find that the defendant was not guilty of negligence in running its trains at too great a rate of speed.

Excepted to by defendant.

Refused.

400

XXI.

The defendant claims that the train which collided with the plaintiff's carriage was for some time prior thereto switching backwards and forwards over the place where the said collision occurred and on a side track, and also claims that the plaintiff, while the said train was so switching, passed along to the north side of the freight-house and along defendant's right of way down to and in front of the place called White's saloon, and there turned his team on a piece of ground much higher than where said box cars adjacent to said freight-house were standing, and that plaintiff from that time until the time of the collision could see, with the exception of a few feet, the train (over the top of the box cars) with which he subsequently collided; and I charge you that if you find from the evidence that the plaintiff, from said point in front of White's saloon or at any point between there and said point of collision, could have seen the said approaching train or any portion thereof by looking up or down the track, and that he drove upon the track failing to look or, looking, did not heed, and that the collision subsequently occurred, then the plaintiff was guilty of negligence contributing to the injury, and you should find for the defendant.

Refused.

Excepted to by defendant.

XXII.

It is shown by the evidence, and not disputed, that the plaintiff was accustomed to pass this crossing, and may be presumed to know and be acquainted with the usual rate of speed with which trains passed this crossing, and if this train was not moving at a greater rate he should be held as bound to exercise such care and caution as to avoid collision with such train moving at usual rates.
401 So that unless you find that the train was moving at an unusual and unreasonable rate of speed you would be warranted in finding that the plaintiff was guilty of negligence which contributed to the injury, and hence not entitled to recover.

Refused.

Excepted to by defendant.

XXIII.

Common prudence and common caution require every person approaching a railroad crossing, if he knows of it and has reason to expect a train to pass, and especially if he does expect a train to pass, to pause and see if he can cross in safety, and if there be any danger at all he is bound to wait until it is past, and although there may be much practice to the contrary, still if he did not do this he does not exercise either common prudence or common caution. Hence, if you find from the evidence that the plaintiff knew the crossing and had reason to believe that a train would soon pass, or that he knew that a train was soon to pass and he did not stop to look and listen for the purpose of ascertaining whether he could the track, which would be the plaintiff in this case. Common prudence and common caution require every person approaching a railroad crossing, if he knows of it, to pause and see if he can cross in safety, and if there be any danger at all he is bound to wait until it is past, although there may be much practice to the contrary; still if he does not do this he does not exercise either common prudence or common caution.

Excepted to by defendant.

Refused.

398

XIX.

There are but two acts of negligence charged in plaintiff's complaint. The first one relates to the leaving of the cars on the side track adjacent to the freight-house. Concerning that I have instructed you. The other relates to the running of the train just prior to and at the time of the collision. It is averred in the complaint that the defendant negligently caused its train to be pushed rapidly along its track to the place where said collision occurred. There is evidence in this case tending to show that the planking at the place where said collision occurred is 28 feet in width, and that said planking is 33 feet in length, and that the box cars on the side track nearly abutted onto said planking; that the place where said collision occurred was on the south side of said planking; and it is claimed by the defendant that the plaintiff had an unobstructed view of the train which subsequently collided with plaintiff's carriage at the very moment and for a little time before the plaintiff reached within sixteen feet from the place where said collision occurred; and if you find from the evidence that the plaintiff could have seen said train by looking up or down the track at the time when said plaintiff was 16 feet or more from the place where said collision occurred and the said plaintiff failed so to do, then he was guilty of contributory negligence and
399 cannot recover in this case, notwithstanding you may find that the defendant negligently rapidly pushed its train down to said place where said collision occurred.

Excepted to by defendant.

Refused.

XX.

The defendant claims, and there is evidence tending to show, that the train was running so slow that the caboose which collided with the plaintiff's carriage did not move more than 25 feet after the collision, and that said train at said time of collision was not running to exceed 6 miles per hour; and if you find that the train had stopped within 25 feet after the collision and that it was not running at the time of said collision at a greater speed than 6 miles per hour, then you will find that the defendant was not guilty of negligence in running its trains at too great a rate of speed.

Excepted to by defendant.

Refused.

400

XXI.

The defendant claims that the train which collided with the plaintiff's carriage was for some time prior thereto switching backwards and forwards over the place where the said collision occurred and on a side track, and also claims that the plaintiff, while the said train was so switching, passed along to the north side of the freight-house and along defendant's right of way down to and in front of the place called White's saloon, and there turned his team on a piece of ground much higher than where said box cars adjacent to said freight-house were standing, and that plaintiff from that time until the time of the collision could see, with the exception of a few feet, the train (over the top of the box cars) with which he subsequently collided; and I charge you that if you find from the evidence that the plaintiff, from said point in front of White's saloon or at any point between there and said point of collision, could have seen the said approaching train or any portion thereof by looking up or down the track, and that he drove upon the track failing to look or, looking, did not heed, and that the collision subsequently occurred, then the plaintiff was guilty of negligence contributing to the injury, and you should find for the defendant.

Refused.

Excepted to by defendant.

XXII.

It is shown by the evidence, and not disputed, that the plaintiff was accustomed to pass this crossing, and may be presumed to know and be acquainted with the usual rate of speed with which trains passed this crossing, and if this train was not moving at a greater rate he should be held as bound to exercise such care and caution as to avoid collision with such train moving at usual rates.
401 So that unless you find that the train was moving at an unusual and unreasonable rate of speed you would be warranted in finding that the plaintiff was guilty of negligence which contributed to the injury, and hence not entitled to recover.

Refused.

Excepted to by defendant.

XXIII.

Common prudence and common caution require every person approaching a railroad crossing, if he knows of it and has reason to expect a train to pass, and especially if he does expect a train to pass, to pause and see if he can cross in safety, and if there be any danger at all he is bound to wait until it is past, and although there may be much practice to the contrary, still if he did not do this he does not exercise either common prudence or common caution. Hence, if you find from the evidence that the plaintiff knew the crossing and had reason to believe that a train would soon pass, or that he knew that a train was soon to pass and he did not stop to look and listen for the purpose of ascertaining whether he could cross with safety, he is guilty of negligence contributing directly to the injury of which he complains, and you should find a verdict for the defendant.

Refused.

Excepted to by defendant.

XXIV.

If you find from the evidence that the plaintiff knew the position of the train with which his carriage collided at any time before attempting to cross the track where the collision occurred, and that plaintiff had a knowledge of the character of the train and had reason to expect it soon to pass the point where the collision took place before attempting to cross the track and did not stop to look 402 and listen for its approach, such omission was negligence on his part contributing directly and approximately to the injury complained of, and you should find a verdict for the defendant.

Refused.

Excepted to by defendant.

XXV.

If you find from the evidence that the plaintiff could have seen the approaching train with which his carriage collided by looking in the direction of it before he reached the crossing where the collision took place and in time to have avoided the collision by the exercise of care and prudence equal to the danger incident to passing over railway crossings and omitted so to do, such omission was negligence, and you should find a verdict for the defendant.

Given.

Excepted to by plaintiff. Andrews & Jones, att'ys for plaintiff.

XXVI.

If you find from the evidence that the bell of the locomotive was ringing at the time that plaintiff approached the crossing and that the train was not running faster than six miles per hour you should find a verdict for the defendant.

Refused.

Excepted to by defendant.

XXVII.

It appears from the evidence in this case that the defendant was the owner of this right of way, located its yard, and permitted the ground where the accident occurred to be used by the public. Under such circumstances the court instructs you that it was not negligence in defendant to have its yard where it was then kept and maintained.

Refused. Abstract.

Excepted to by defendant.

403

XXVIII.

If you find from the evidence that the plaintiff could, by stopping and waiting until the wagons of Fish and Breslaun had passed over the crossing and planking and the noise caused thereby ceased, have heard the rumbling or noise of the train and neglected and failed to stop for such length of time and purpose, but, on the contrary, drove over said crossing and the collision ensued, then you should find for the defendant.

Refused.

Excepted to by defendant.

XXIX.

If you find from the evidence that the plaintiff was acquainted with the place where the collision occurred at the time thereof, and that he knew that the same was within the switching yard of the defendant, and that the defendant, in the usual course of its business, was liable to run switching and other trains over said place of collision at any time, then the plaintiff, in approaching said place where said collision occurred, was bound to expect that a train might approach and cross the same at any moment; and if the plaintiff approach*ing* said place of collision with such knowledge at the time when his view was obstructed and when there was some noise, so that he could not hear the rumbling of the approaching train, without stopping to listen and failed to stop to listen, then the plaintiff has been guilty of contributory negligence, and your verdict should be for the defendant.

Refused.

Excepted to by defendant.

XXX.

If the jury find from the evidence that the plaintiff, when he was
forty to fifty feet from the place where the collision occurred, could,
by looking over the box cars standing adjacent to the freght-
404 house, have seen the approaching train, but drove without
looking upon the track and the collision occurred, then the
plaintiff was guilty of contributory negligence. and your verdict
should be for the defendant.

Given.

Excepted to by plaintiff. Andrews & Jones, att'ys for plaintiff.

XXXI.

If you find from the evidence that the plaintiff when within 16 to 20 feet or 23 feet of the place where the collision occurred could by looking have seen the approaching train and failed to look at said point, but drove directly upon the track and the collision occurred, he is guilty of contributory negligence and cannot recover.

Given.

Excepted to by plaintiff. Andrews & Jones, att'ys for plaintiff.

XXXII.

If the jury finds from the evidence that when the plaintiff was within 15, 20, or 23 feet of the place where the collision occurred by looking could see the approaching train, and that by hurrying up his horses he thought he could get over the track and avoid the collision and took his chances so to do, and also find that the plaintiff could by checking his horses have avoided the colliding train and failed so to do, then you should find that the plaintiff had been guilty of contributory negligence and your verdict should be for the defendant.

Given.

Excepted to by plaintiff.

XXXII½.

If you find that the plaintiff when he was 16, 20, or 23 feet from the place where the collision occurred could have seen the approaching train, but was driving his horses at said time at such a rapid rate that he could not stop said horses before they got upon 405 the track, then the plaintiff was guilty of contributory negligence in not approaching said track cautiously, and your verdict should be for the defendant.

Given.

Excepted to by plaintiff. Andrews & Jones, att'ys for plaintiff.

XXXIII.

The plaintiff avers in his complaint that he did not know that there was a train in 800 feet of the place where the collision occurred at the time he attempted to cross said track. Plaintiff has offered no evidence to sustain this averment, and, upon the contrary, the testimony shows that the plaintiff was acquainted with the place where the collision occurred; that he saw a train passing to the east just prior to that time and that it was a switching train; knew where the switches were located east of the place where the collision occurred. The evidence also tends to show that he knew that said switches were within 800 feet of the place where said collision occurred. I charge you, under the circumstances, that there is no evidence offered by plaintiff to support the averment that he did not know that there was a train within 800 feet of said place of collision. I further charge you that plaintiff was bound to know that the train might stop at the first switch east of the crossing and reverse and run back over the very track it had recently gone over at any moment, and that the plaintiff was bound to approach the crossing as though he did know it, and if he failed so to do he is guilty of contributory negligence and cannot recover in this case.

Refused.

Excepted to by defendant.

406

XXXIV.

If the jury find from the evidence that the rumbling or noise of the approaching train which subsequently collided with plaintiff's buggy could have been heard a distance of fifty feet or more from the place of collision by the plaintiff if he had stopped to listen before attempting to cross, and you further find that the plaintiff's view was obstructed by the depot and box cars or otherwise, and you further find that the plaintiff failed to stop and listen, then I charge you that the plaintiff has been guilty of contributory negligence in this case, and your verdict should be for the defendant.

Refused.

Excepted to by defendant.

XXXV.

If you find that warning of the approaching train was given the plaintiff by Peterson and Fish, or either of them, as he was approaching the place of collision, — the plaintiff through inattention failed to hear said warning or, hearing, failed to heed the same, then the plaintiff was guilty of contributory negligence, and your verdict should be for the defendant.

Refused.

Excepted to by defendant.

XXXVI.

The court charges you that the drinking and use of intoxicating liquors is a cause of deafness and dulls the sense of hearing in some degree while under the influence thereof. (The portion of instruction just proceeding this is not given.) If you find from the evidence that the plaintiff had been drinking on the day of and prior to the collision, and that said drinking did to any extent prevent his hearing the rumbling of the approaching train or to make or render said plaintiff incautious, and that by said incautiousness and dullness of hearing as aforesaid he did not hear the 407 rumbling of said train or the warnings given by Peterson and Fish, if any such were given, and that failing so to hear said warning or said rumbling he drove directly upon said track and said collision occurred, then I charge you that the plaintiff has been guilty of contributory negligence in this case and cannot recover.

Refused as written, but given as modified.

Excepted to by Andrews & Jones, att'ys for pl't'ff.

Excepted to by defendant as modified.

XXXVII.

It is conceded by the plaintiff that he was acquainted with the place where the collision occurred at the time thereof; that said place was within the switching yard of the defendant; that he saw the train which subsequently collided with him moving toward the east and knew that it was a switching train. There is evidence also tending to show that the switching and other trains at and prior to said time were passing over the place where the collision occurred as often, at least, as one hundred times per day, and that the defendant had no regular time for switching, but switched and ran its trains over said place whenever occasion and business required. There is evidence tending to show that plaintiff knew this to be the fact. There is evidence tending to show that the plaintiff had reason to expect that said switching train might return and pass over the place where the collision occurred at any moment. There is evidence tending to show that the wagons of Breslaun and Fish and their teams, as well as plaintiff's team and carriage, were making some noise, and there is evidence tending to show that as the plaintiff approached the place where the collision occurred his view of the approaching train was somewhat obstructed. I charge you, if you find these facts to be true, then the noise of the wagons and teams aforesaid and obstructions aforesaid enjoined upon the plaintiff a greater vigilance than other- 408 wise would be required of him if there were no obstructions in the way and no noise; and I further charge you that the plaintiff was bound to exercise care and caution commensurate with the danger; and if you find from the evidence that a reasonably prudent and careful man approaching said crossing under such circumstances would have stopped and waited until the noise made by the wagons and teams of Fish and Breslaun had subsided in order that he might listen to better advantage and plaintiff failed so to stop and listen, but, on the contrary, drove onto the track and the collision occurred, then he failed to do that which a prudent and careful man under the circumstances ought to have done, and such failure is contributory negligence on the part of the plaintiff, and your verdict should be for the defendant.

Given.

The foregoing instruction is excepted to by plaintiff. Andrews & Jones, att'ys for plaintiff.

38.

I further charge you that if you find that the plaintiff's view of the approaching train as he was approaching the place where the collision occurred was at some point obstructed that such obstructions required him to look with greater care and caution for the coming train at the points where he could see, and I further charge you that if you find that the wagons and teams of Breslaun and Fish made a temporary noise as plaintiff was approaching the place where the collision occurred and said noise prevented in any degree plaintiff's hearing the noise of the approaching train, then such noise required of plaintiff greater care and caution in listening for said train, and said noise also required of the plaintiff greater 409 care in looking for the train at points where he could see.

Given.

Excepted to by plaintiff. Andrews & Jones, att'ys for plaintiff.

39.

Plaintiff concedes that he had been drinking intoxicating liquor on the day of and prior to the accident, and there is evidence tending to show that warning was given the plaintiff by Fish and Peterson at a time when plaintiff was but a short distance from the place where the collision occurred, and that plaintiff paid no heed to said warning, but is claimed by the plaintiff that he did not hear said warning, and it is claimed by the defendant he did not hear them because his sense of hearing was dulled by the amount of liquor he had drunk on that day. If you find such to be the fact, then I charge you that the plaintiff because of said dullness of hearing was bound to exercise greater care and caution in looking and listening for said approaching train than if he had not been drinking. By common observation we know that it is difficult for one who has been drinking to tell to just what extent his sense of hearing is dulled by said drinking, and the fact that the plaintiff had been drinking is a circumstance for you to consider in determining the amount of care and caution he should have exercised in approaching the place where the collision occurred, and I leave it for you to determine, considering the fact if there was some temporary noise and the plaintiff's view was totally or partially obstructed, and that he had been drinking, and all the other facts in his case, to determine whether or not it was the duty of the plaintiff to stop and wait until that temporary noise, if any such was there, has passed away before
he attempted to cross the track. If you find that in the ex-
410 ercise of reasonable caution and care he should have done
that under all the circumstances in this case, and it is conceded that he did not, then I charge you that your verdict should be for the defendant.

Refused.

Excepted to by defendant.

40.

I further charge you that if you find that plaintiff's view of the approaching train was totally or partially obstructed as he approached the place where the collision occurred, that his opportunity of hearing the noise of said train was obstructed by the noise of the teams of Fish and Breslaun, and that the plaintiff's sense of hearing was dulled by the liquors he had been drinking on that day, and if you find that the plaintiff had reason to believe that a train might cross the place where the collision occurred at any moment, and that there are no other circumstances in this case to the contrary of the aforesaid enumerated circumstances, then it was the duty of the plaintiff to stop and listen for the coming train before going upon the track, and if he failed to do that—and it is conceded that he did—then your verdict should be for the defendant.

Refused.

Excepted to by defendant.

411 That the court gave all such instructions except instructions numbered as follows: 2, 3, 6, 7, 8, 9, 10, 14, 16, 16½, 17,

18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 33, 34, 35, 36, 39, & 40, and that the court then and there refused to give such instructions and the defendant then and there excepted to each and every refusal to give such instructions, and the said exceptions were then and there duly allowed. At defendant's request the court submitted to the jury 37 special questions and instructed the jury to make special findings on said questions; that plaintiff, before said special questions were submitted to the jury, duly objected to the submission to the jury of all the questions numbered 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18. 23, 24, 26, 27, 28, 30, 31, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, & 47, for the reason and upon the ground that each of said questions was irrelevant, immaterial, and improper; each of which objections was overruled by the court, and plaintiff then and there excepted to each of the said rulings and his exceptions were then and there duly allowed by the court.

That on the return of said verdict and special findings and in the time allowed by law defendant's counsel then and there duly excepted to said findings numbered 13, 16, 17, 24, 25, 27, 28, 30, 31, 34, 38, 39, 41, 42, 46, & 47, and said exceptions were then and there by the court duly allowed. When this last exception was claimed the court inquired of counsel for defendant if it was thereby intended to except to any ruling or act of the court in connection with said findings, and counsel replied that such was not the purpose. Thereupon the court allowed the exception.

412 That the defendant then and there and within the time allowed by the court filed its motion for a new trial, and the court after argument of counsel and upon due consideration thereof overruled said motion.

That said ruling was made by the court in vacation; to which ruling of the court defendant at the time of said ruling duly excepted, and said exception was then and there allowed; and the defendant now assigns as error each and every matter and thing set forth in said motion for a new trial; and now, at the request of defendant's counsel and within the time allowed by court, this bill of exceptions is settled and allowed, and—

I, George Turner, judge of the above-entitled court, do hereby certify that the foregoing bill of exceptions from page one to page three hundred and fifteen, inclusive, contains a statement of the facts and evidence and all of the evidence introduced at the trial and upon which said cause was heard and determined, and that said bill of exceptions contains all material facts necessary to a determination of any and all questions involved in said cause and the rulings thereon, except such rulings as were entered of record at the time of the occurring thereof.

Settled and signed this eighth day of March, A. D. 1886.

GEORGE TURNER,
Judge of the Above-entitled Court.

413 In the Supreme Court of the State of Washington.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES HOLMES, Defendant in Error.

UNITED STATES OF AMERICA.

STATE OF WASHINGTON,
County of Thurston.

I, Sol. Smith, clerk of the supreme court of the State of Washington, and, as such, custodian of the records, papers, and files of the supreme court of Washington Territory, do hereby certify that the following, hereunto attached, is a full, true, and correct transcript of so much of the record in the above-entitled cause as I am by law required on writ of error to transmit to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and the seal of said supreme court of the State of Washington this 13th day of October, 189–.

[Seal of the Supreme Court, State of Washington.]

SOL. SMITH,
Clerk of the Supreme Court of the State of Washington.

414 In the Supreme Court of the United States.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES HOLMES, Defendant in Error.

SIR: You will please enter my appearance for The Northern Pacific Railroad Company, plaintiff in error, in this cause.

JAMES McNAUGHT,
For Northern Pacific Railroad Company, Plaintiff in Error.

To James H. McKenney, clerk of the Supreme Court of the United States.

Endorsed on cover: Case No. 14,422. Washington supreme court. No. 354. The Northern Pacific Railroad Company, plaintiff in error, *vs.* James Holmes. Filed November 14, 1890.

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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1890

NORTHERN PACIFIC RAILROAD CO.
Plaintiff in Error,
vs.
JAMES HOLMES,
Defendant in Error.

1557

Error to the Supreme Court of the State of Washington as Successor to the Supreme Court of Washington Territory.

Brief of the Defendant Upon His Motion to Dismiss the Writ of Error.

JOHN B. ALLEN,
Attorney for Defendant in Error.

W. R. Andrews,
Of Counsel.

LOWMAN & HANFORD STATIONERY & PRINTING CO., SEATTLE.

IN THE

SUPREME COURT

OF THE

UNITED STATES

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,
vs.
JAMES HOLMES,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON AS SUCCESSOR TO THE SUPREME COURT OF WASHINGTON TERRITORY.

BRIEF OF THE DEFENDANT UPON HIS MOTION TO DISMISS THE WRIT OF ERROR.

On the 2nd day of February, 1888, judgment was entered in the Supreme Court of Washington Territory in favor of the defendant and against the plaintiff herein for $10,000 and interest and costs.

At the same time notice of a motion for a rehearing was given and an order was thereupon made by the Court allowing the plaintiff until July 17th, 1888, in which to file such petition; and directing a stay of proceedings until sixty days after the determination of the petition. The petition was filed within the time provided in the order, and at the July term it was taken under advisement but was never passed upon by that Court. Upon the admission of Washington Territory into the Union the Supreme Court of the State ordered the defendant to show cause why a rehearing should not be had. A showing was made and in April or May, 1890, an order was entered refusing the rehearing.

The motion to quash this writ is because this Court has no jurisdiction of the action, and it is grounded upon two propositions:

Eirst. That the judgment is of the State Court, and no federal question is involved, or

Second. If it is a judgment of the Territorial Court then the writ has not been prosecuted within the time limited by law.

The operation of the judgment was suspended during all the life of the Territorial Court, and the action of the State Court was required to give it effect.

Section 482 of the Code of Washington, in force during all the time covered by these proceedings, is as follows:

Section 482: "If a petition for a rehearing be filed the same shall suspend the decision of the Court on its presentation, or one of the Judges if in vacation shall so order, in either of which case such decision shall be suspended until next term."

Under this provision the decision was *suspended,* and it never had any vitality under the old order of things. At no time was the defendant entitled to his execution. His judgment was liable to be modified or reversed, until the day it became final by the order of the State Court refusing the rehearing. Something besides what had been done by the Territorial Court was necessary, and that something else vivified and made the judgment the "*final* determination of the rights of the parties" in that Court.

Outside of the statute just quoted there are many decisions of this Court to the effect that a motion for a rehearing, if made in time, operates as a suspension of the judgment until the motion shall have been determined, and that it does not become final until such time.

Brockett vs. Brockett, 2 How., 240, 241.
Wylie vs. Cox, 14 Howard, 2.
Slaughter-house Cases, 10 Wall., 289.
Memphis vs. Brown, 94 U. S., 717, 718.
Cambuston vs. United States, 5 Otto, 287.
Texas Pac. R'y Co. vs. Murphy, 111 U. S., 488.
Sage et al. vs. C. P. R. R., 3 Otto, 418.

It is further submitted that it is the manifest intent of Congress, as expressed in the Act, by means of which Washington Territory was admitted into the Union, that only those judgments which were final at the time of the admission should be reviewed.

25 U. S. Stat. at Large, p. 676.

In Section 22 are found provisions covering two classes of cases. First—Those upon which a writ of error had been prosecuted and was pending in th~~is~~ Court at the time of the admission; and with respect to the second, the language of the statute is as follows:

" And that from all judgments and decrees of the Supreme " Court of either of the Territories mentioned in this Act, in " any case arising within the limits of any of the proposed " States, *prior to admission*, the parties to such judgment shall " have the same right to prosecute appeals and writs of error " to the Supreme Court of the United States as they shall " have had by law prior to the admission of said State into " the Union."

The judgment then should have been prior to the admission. This judgment did not become final until after the admission, and no writ is provided for the review of such judgments.

It is thought that Section 23 of the Act in question confirms this view. Its provisions are as follows:

" That in respect to all cases, *proceedings and matters* now " pending in the Supreme or District Courts of either of the " Territories mentioned in this Act, at the time of the " admission into the Union of either of the States mentioned " in this Act, whereof the Circuit or District Courts, by this

"Act established, might have had jurisdiction under the "laws of the United States had such Courts existed at the "time of the commencement of such causes, the said Circuit "and District Courts, respectively, shall be the successors of "said Supreme and District Courts"

"And in respect to all other cases, proceedings and mat- "ters pending in any of the Territories mentioned, at the "time of the admission of said Territory into the Union, " * * * the Courts established by said States shall "respectively be the successors of said Supreme and District "Territorial Courts, * * * and the same shall be pro- "ceeded with therein in due course of law. * * * Pro- "vided, that in all civil actions, causes and proceedings, " * * * transfer shall not be made to the Circuit or "District Court of the United States except upon written "request, * * * and in the absence of such request "such cases shall be proceeded with in the proper State Courts."

The motion for a rehearing was certainly a *proceeding*, and was *pending* in the Supreme Court of the Territory until the time of admission.

It then became a matter over which the State Court had full jurisdiction. It could modify or reverse, as it thought proper. That Court saw fit to affirm by refusing a rehearing.

A comparison of Sections 22 and 23, above quoted, seems to demonstrate that it was only as to those matters that had become final in the Territorial Supreme Court that Congress intended should be heard in the Supreme Court of the United States.

It could not have been intended that a litigant could ask this Court to hear his cause after he had, by his own action, taken it over into the newly-established tribunal, and had practically tried his cause there.

Congress must have intended that those cases which had been finally disposed of in the Territorial Supreme Court could be reviewed in this, and that those causes in which any matter or proceeding was still pending were to pass under the jurisdiction of the State Court and become the property of the latter Court.

At the time of the admission of Washington Territory into the Union the plaintiff had before it two remedies, which, although not ordinarily so, became inconsistent the moment the Territory became a State.

One remedy was its petition for a rehearing, the other a writ of review. The former was chosen as the more satisfactory; by means of it the formal decision never became a judgment until after the Territorial Court became a thing of the past. This remedy has certainly been effective in one way. It has robbed the litigant of the fruits of his victory for a long time, and compelled him to face another tribunal not known to the law at the time his judgment was rendered, and to maintain his rights there.

At any time prior to the admission it was the plaintiff's privilege to abandon its petition for a rehearing and to sue out its writ of error.

The motion for a rehearing being a *proceeding* pending in the Territorial Supreme Court the plaintiff had a right to request its transfer to the United States Circuit Court and that Court would have had the power to have done whatever should have been thought proper. The plaintiff elected to continue the jurisdiction of the cause in a Court from which a writ of error does not lie.

It has had its election, and enjoyed all the advantages of a long delay. It ought not now to be heard to complain that the decision of the Court into which it has voluntarily carried its cause has been adverse to it.

Again, while Congress has made the Supreme Court of the State the successor of the Territorial Supreme Court for some purposes, and notably for the purpose of taking cognizance of all unfinished matters, it is submitted that no authority can be found for requiring the former Court to send to this, any matter over which it has obtained jurisdiction.

Hunt vs. Palao, 4 How., 589.

Second. If the Court should be of the opinion that the judgment in question is not the judgment of the State Court, as has been contended, but of the Territorial Court, it is then urged that the writ of error has not been prosecuted within the two years limited by Sections 702, 1003 and 1008 of the Revised Statutes.

The formal date of the judgment is February 2nd, 1888. The writ of error was not sued out until May, 1890.

Respectfully submitted,

JOHN B. ALLEN,
Attorney for Defendant in Error.

W. R. ANDREWS,
Of counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1893.

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

JAMES HOLMES,
Defendant in Error.

No. 354.

IN ERROR TO THE SUPREME COURT OF WASHINGTON TERRITORY.

Brief and Argument on behalf of Plaintiff in Error.

Statement.

Defendant in Error filed his complaint in the Territorial District Court at Cheney, Washington Territory, in February, 1884; and avers therein negligence on the part of Plaintiff in Error, in permitting a number of box cars to stand adjacent to "B" Street, so-called, in the town of Sprague; and in running one of its trains over the crossing of

"B" Street, so-called, at a negligent rate of speed and without warning.

Defendant in error in driving over the so-called "B" Street crossing, with a team of horses and buggy, collided with one of the plaintiff in error's trains, and was injured. He claimed $25,000 damage for injuries sustained by him.

Plaintiff in error answering, admits the location of the cars, but denies negligence. Admits the running of the train, but denies that it was run negligently, or incompetently, or without warning. Admits the collision, but denies the damage alleged; plaintiff in error affirmatively avers that negligence upon the part of defendant in error contributed to the injury.

The collision occurred in November, at four o'clock in the afternoon of a clear calm day, in the switch yard of the plaintiff in error. Defendant in error showed by the testimony of his own witness, which is not controverted, that the usual rate of speed for switch trains in said yard was from twelve to fifteen miles an hour (see Rec. p. 52).

The switch train at and prior to the col~~lection~~ision was running at less than half the usual rate, to wit, six miles an hour (see Rec., 163).

The method adopted by the company for giving notice of the running of switch trains in the switch yard was the ringing of the engine bell; as the train was approaching the bell was ringing, but not continuously (see Rec., pp. 165, 182, 201, 202, 203).

The defendant in error went into the country on the morning of the day of the accident, in a buggy, with a saloon keeper by the name of White. Each of them taking a bottle of whiskey. Holmes took one or two drinks of whiskey before leaving (see Rec., pp. 67, 68, 124, 125).

During the day he took five or six drinks out of his own bottle, and as many drinks out of White's bottle as White took himself (see Rec., pp. 141, 142).

The quantity of liquor Holmes took materially affected his caution, vision and hearing. (see Rec., p. 195).

On returning from the country about four o'clock in the afternoon Holmes left White at the saloon, a distance of about three hundred feet from and in plain view of the crossing, the railway tracks, and the switch engine and train. (see Rec., p. 77). At this time Holmes saw the train going east, and knew that it was the switch train working in the yard (see Rec., pp. 68, 80).

When Holmes first saw the train it was moving east. He had worked in the shops and yard about a year prior to that time, and was familiar with the location of the switches in the yard and the management of switching trains (see Rec., pp. 68, 70, 83).

The first switch is eighty feet east of the crossing, and the second one hundred and forty feet. The switch train was liable to stop and reverse at either of these switches. It stopped and reversed and started back over the crossing at the second switch, while Holmes was driving from White's saloon to the crossing (see Rec., p. 162).

Holmes, by looking over the box cars adjoining the depot, could have seen the engine and caboose of the switch train all the way from White's saloon to the place of the collision, with the exception of a distance of about 22 feet; they were hidden from view for a distance of about 22 feet, commencing at a point about 50 from the crossing, and again came into view about 25 or 30 feet from the crossing. (see Rec., pp. 176, 184, 185, 33, 34).

Holmes drove at a trot from the saloon to the planking adjoining the crossing. At the planking he slackened his horses to a walk, on account of the little rise from the ground to the planking. (see Rec., p. 79).

Holmes was going eastward, and while his horses were on the planking, two other teams, going west, were on the planking (see Rec., pp. 68, 79, 101, 102, 111).

The wheels of the three wagons and the horses' hoofs moving upon the planking made a great noise (see Rec., p. 110). While Holmes was upon this planking, Fish, the driver of one of the teams, and one Peterson, each of whom were within twelve feet of Holmes, warned him of the approaching train (see Rec., pp. 112, 150).

While Holmes was on the planking, Romick, the yardmaster, was standing at the switch adjacent to the crossing on the east side of the track, directly in front of Holmes and in plain view, giving the usual and customary signal for the train to back up and cross the crossing, and he then walked eastward (see Rec., pp. 110, 111).

When Holmes was within twenty-two feet of the track on which the collision occurred he could have seen the train approaching him for a distance of seventy feet to the east (see Rec., pp. 176, 184, 185).

The noise of the approaching train, if he had stopped and listened, could have been heard from one to four hundred feet from the crossing (see Rec., p. 117).

The noise of the approaching train, notwithstanding the movement of the wagons and six horses on the planking, could have been heard by listening attentively from fifty to two hundred feet from the crossing (see Rec., p. 117).

Holmes expected the switch train to return and pass over the crossing (see Rec., pp. 80, 150).

Holmes, in driving from the saloon to the crossing, did not look over the top of the box cars so as to observe the movement of the plainly visible engine and caboose, constituting part of the train; he did not stop and listen; he moved over the planking when the noise of the three wagons and teams, together with the whiskey he had drank that day, would prevent his hearing the noise of the approaching train without stopping and listening (see Rec., pp. 78, 79, 80, 81).

He did not hear the warnings of the approaching train given by Fish and Peterson when they were within twelve feet of him (see Rec., pp. 149, 150).

He did not see the signal given by the yardmaster for the train to reverse and back towards the crossing, and did not see the yardmaster then move eastwards (see Rec., p. 149).

When within twenty-two feet of the tracks he did not look to the east so as to see the approaching train that was plainly visible. He approached the crossing without taking his whip from the socket into his hands, with the horses moving at the rate of four or five miles an hour, the train moving at the rate of six miles an hour (Rec., pp. 67, 150).

Defendant in error recovered judgment in the Territorial District Court for $10,000 and costs.

On appeal, the Supreme Court of Washington Territory reversed said judgment and remanded the cause, with instructions to grant plaintiff in error's motion for a non-suit; this opinion was rendered by Chief Justice Green and concurred in by Associate Justice Hoyt, Associate Justice Langdon dissenting (14 Pac. Rep., p. 688).

Defendant in error then petitioned the Supreme Court of Washington Territory for a re-hearing. After the reversal of the judgment of the Territorial Court by the Supreme Court, and prior to the presentation by the defendant in error of the said petition for re-hearing, Chief Justice Green had retired from the Supreme Bench of Washington Territory and the bench had been filled by the election of Associate Justice Allyn. The Court, as then constituted, granted said petition for a re-hearing, and, on said re-hearing, affirmed the judgment of the Territorial District Court; the opinion on said re-hearing was handed down by Associate Justice Allyn and concurred in by Associate Justice Langford; Chief Justice Jones dissented (18 Pac. Rep., p. 76).

It will thus be seen that the questions involved in this case have been considered by five Justices of the Supreme Court of Washington Territory, and that three of said Justices, namely, Green, Hoyt and Jones, have decided in favor of plaintiff in error, and that, although only two of said Justices, namely, Allyn and Langford, have decided in favor of defendant in error, yet the judgment stands today in favor of defendant in error.

The case was brought to this Court on writ of error by the railroad company.

Jurisdiction.

Before going into the merits of this case it will be necessary to consider the motion made by defendant in error to dismiss the writ of error upon which this case is brought here, upon two grounds, viz.:

(1.) That the judgment is of the State Court and there is no Federal question involved.

(2.) If it is not the judgment of the State Court, but of the Territorial Court, then the writ of error has not been prosecuted within the time allowed.

We answer these objections as follows:

(1.) The judgment appealed from is not the judgment of the State Court, but the judgment of the Territorial Court, and is so specified in the order allowing the writ (Rec., p. 10).

(2.) The judgment of the Territorial Court, which is the final judgment, to reverse which this writ of error was brought, although rendered February 2, 1888, was suspended by the subsequent action of said Court in granting plaintiff in error leave to file a petition for re-hearing, and did not take effect until said petition for re-hearing was denied, March 8, 1890. The time within which the writ of error could be sued out did not commence to run until the removal of said suspension by the refusal to grant said re-hearing.

(3.) The Act of Congress admitting Washington to the Union provides for maintaining this writ of error.

(4.) The application for this writ of error was made February 2, 1888, the very day on which the judgment appealed from was rendered, and even if it were not for the suspension of the judgment of the Supreme Court of the Territory of Washington by the filing of said petition for re-hearing, the application made February 2, 1888 for this writ of error would have been sufficient, even though the citation was not signed and the security not approved within two years from the date of judgment.

(1.) In order to sustain the contention that the judgment appealed from is the judgment of the State Court and not that of the Territorial Court, it will be necessary for this Court to hold that the judgment rendered by the Territorial Supreme Court affirming the judgment of the Court below, was not the final judgment in this case, but that the denial of the Supreme Court of the State of Washington to grant plaintiff in error's petition for a re-hearing is the final judgment. We are unable to conceive any ground upon which this contention can be sustained. We contend that the final judgment in this case was rendered when the Supreme Court of Washington Territory affirmed the judgment of the District Court (Black on Judgments, Secs. 21 and 22). If that were not the final judgment, the petition for re-hearing could not be entertained by the Court.

The order made by the Supreme Court of the State of Washington denying the petition for re-hearing was an interlocutory order and in no sense final. The cases in which this Court has held that the granting or refusal of a petition for re-hearing is within the sound discretion of the Court, and not a final judgment, are too numerous and well known to this Court to merit citation here. Therefore, the order of the Supreme Court of the State of Washington denying the petition for re-hearing not being reviewable here, no question is presented upon any order or ruling of the Supreme Court of that *State*. The judgment appealed from was rendered by the Territorial Supreme Court in 1888, but was suspended by order of the Court on the filing of a petition for re-hearing; while the final judgment was so suspended, the Territory of Washington was admitted into the Union, and the determination of the petition for re-hearing, then pending in the Territorial Court, devolved upon the State Court as the successor of the Territorial Court.

The filing of the petition for re-hearing was in no sense a waiver of the right to the writ of error (U. S. *vs*. Hodge, 6 How., 279).

(2.) Defendant in error urges that, granting that the judgment appealed from is the judgment of the Territorial Court, the writ of error was not sued out within the time allowed by law.

This contention is wholly groundless. This Court has held that the filing of a petition for re-hearing suspends a final judgment until the determination of such petition, and that the time within which a writ of error can be sued out does not commence to run until after the removal of such suspension by the determination of the petition for re-hearing. The citation in this case was signed by the Judge and the surety approved by him within less than two months after the removal of the suspension of the final decree of the Territorial Court (Rec., pp. 10 and 11; Brockett *et al. vs.* Brockett, 2 How., 238).

(3.) We submit that the Act of Congress admitting the Territory of Washington into the Union makes express provision for maintaining this writ of error. Counsel for defendant in error, in commenting on Section twenty-two of said act, makes a very serious error, and a misleading and incorrect statement in regard to this statute in stating that said Section 22 provides for maintaining writs of error from final decisions of the Territorial Court in two classes of cases only; as a matter of fact, said section makes express provision for maintaining writs of error in three classes of cases. In addition to those portions of the section referred to by counsel for defendant in error, said Section 22 contains the following provision:

> "That all cases of appeal or writ of error that may hereafter lawfully be prosecuted upon any record from either of said Courts (the Supreme Courts of the Territories) may be heard and determined by said Supreme Court of the United States. And the mandate of execution or further proceedings shall be directed by the Supreme Court of the United States to the * * * Supreme Court of said State."

The latter portion of said Section 22 reads as follows:

> "And each of * * * said Courts herein named shall * * * be the successor of the Supreme Court of the Territory as to all cases arising within the limits embraced within the jurisdiction of such Courts, with full power to proceed with the same and award mesne or final process therein; and that from all judgments and decrees of the Supreme Courts of either of the Territories mentioned in this act, in any case arising within the limits of the proposed States prior to admission, the parties to such judgment shall have the same right to pros-

ecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State into the Union."

25 U. S. Stat., p. 682.

We contend that this portion of Section 22 expressly authorizes this writ of error. It will be observed that the portion of this paragraph making the State Court the successor of the Territorial Court and conferring upon the State Court power to award mesne process in all cases then pending in the Territorial Court, is joined to the portion giving the right of appeal from final judgments and decrees of any Territorial Court to this Court, by the conjunctive "and."

It is apparent from this portion of Section 22 that it was the intent of Congress to permit writs of error to be taken to this Court from final judgments or decrees of the Territorial Court in which purely interlocutory orders had been entered by the State Court as the successor of the Territorial Court. The order entered by the State Court denying the petition for re-hearing in this case was a discretionary order and in no sense a final judgment.

(4.) The judgment of the Territorial Court was rendered Feb. 2, 1888. On that day, in open Court, counsel for plaintiff in error moved for leave to file a petition for re-hearing and for an allowance of time within which to perfect an appeal to this Court after the determination of said application for re-hearing, provided the same should be refused. The Court granted this motion, giving plaintiff in error the right to file a petition for re-hearing, and also giving it 60 days in which to perfect an appeal to this Court, after the determination of the petition for re-hearing, in the event of the same being denied.

Eliminating all other facts from the case, we contend that this prayer of plaintiff in error for a writ of error in the event of an unfavorable decision on the petition for re-hearing, and the allowance of 60 days by the Court within which to perfect proceedings on appeal after the determination of the petition for re-hearing, was in effect an allowance of the appeal, and saves to the plaintiff in error the right to this writ of error even though the citation was not signed and the bond approved until after the expiration of two years from the entry of the judgment (Brandies *vs.* Cochrane, 105 U. S., 262).

ASSIGNMENT OF ERRORS.

I.

The Court erred in refusing to give instruction number two, requested by plaintiff in error, which reads as follows:

> "If it appears from the evidence that the plaintiff is not entirely free from any degree of negligence which contributed to the injury, then the plaintiff cannot recover in this case, notwithstanding you may find that the defendant is guilty of some degree of negligence which contributed to the injury."

This requested instruction stated the rule of law as to contributory negligence correctly. The general charge given by the Court did not state the rule correctly, and plaintiff in error was entitled to have this instruction given.

II.

The Court erred in refusing to give instruction number 7, requested by plaintiff in error, which reads as follows:

"Every person is bound to know that a railroad crossing is a dangerous place, and he is guilty of negligence unless he approaches it as if it were dangerous. If you find from the evidence that the plaintiff was acquainted with the place where the collision occurred, and also find that said place was within the switching yard of the defendant, and also find that defendant did not have a regular time for switching in said yard, or was moving its trains at any time whenever business required therein, and that plaintiff knew such to be the practice of defendant, then the plaintiff was bound to know that a train might be approaching at any time, and if he attempted to cross said track without ascertaining whether one was coming or not, but, on the contrary, drove directly on to the track and the collision resulted, he was guilty of contributory negligence and cannot recover in this action."

There was evidence in the case tending to show that defendant in error was acquainted with the place where the collision occurred, and knew it was the switching yard of plaintiff in error, and that plaintiff in error did not have any regular time for switching its trains, but moved them whenever its business required, with which practice defendant in error was acquainted, and also tending to show that defendant in error approached the track without taking proper precaution to ascertain whether or not the train was approaching. These facts being established, defendant in error was guilty of such contributory negligence as would preclude his recovery, and the requested instruction should have been given.

III.

The trial Court erred in refusing to give instruction number 8, requested by plaintiff in error, which reads as follows:

"It is not the exercise of ordinary care and prudence for a person to drive a team directly on to a railroad crossing, known to him at the time to be dangerous, without making an effort by stopping and listening, or otherwise, to ascertain whether a train is approaching, or whether it is safe."

There was evidence tending to show that defendant in error did drive his team on to the crossing without making any effort to ascertain whether the crossing was safe or whether a train was approaching. The plaintiff in error was entitled to have the jury instructed as a matter of law that, this being the case, defendant did not exercise ordinary care and diligence.

IV.

The trial Court erred in refusing to give instruction number three, requested by plaintiff in error, which reads as follows:

"If there was any negligence on the part of defendant and plaintiff which contributed in any degree to the accident, then the jury have no right to strike a balance between them so as to find a verdict for the plaintiff, but in such case you must find for the defendant."

The instruction given by the Court on this point was a general and misleading one, and the plaintiff in error was entitled to have the jury instructed positively that if defendant in error contributed in any way to his injury by his own negligence, he was not entitled to recover, notwithstanding the fact that plaintiff in error might also have been negligent.

V.

The trial Court erred in refusing to give instruction number 9, requested by plaintiff in error, which reads as follows:

"If you find that the building called depot, mentioned in the pleadings, and the cars on the track adjacent thereto so obstructed the view of the plaintiff that he could not see the train, this fact called him to greater care and watchfulness in driving upon the track than if the view was open. And if in the exercise of ordinary care and vigilance the plaintiff could have heard the noise of the coming train, and then drove upon the track without first fully ascertaining that there was no danger of collision, then he was guilty of negligence and cannot recover in this action."

There was evidence tending to show that defendant in error's view was partially obstructed by the depot and the cars on the track, and that he did not take the care and precaution which the law required of him by reason of such obstruction, to ascertain whether or not a train was moving toward the crossing. If the jury believed this evidence, then the defendant in error was not entitled to recover, and the jury should have been so instructed.

VI.

The trial Court erred in refusing to give instruction number 23, requested by plaintiff in error, which reads as follows:

"Common prudence and common caution require every person approaching a railroad crossing, if he knows it, and has reason to expect a train to pass, and especially if he does expect a train to pass, to pause and see if he can cross in safety. And if there be any danger at all, he is bound to wait until it is past, and although there may be much practice to the contrary, still if he did not do this he does not exercise either common prudence or common caution; hence, if you find from the evidence that the plaintiff knew the crossing and had reason to believe that a train would soon pass, or that he knew a train was soon to pass, and he did not stop to look and listen for the purpose of ascertaining whether he could cross with safety, he is guilty of negligence contributing directly to the injury of which he complains, and you should find a verdict for the defendant."

This requested instruction correctly states the rules of law applicable to the facts in this case which were not stated in any portion of the charge given by the trial Court to the jury, and should have been given.

VII.

The trial Court erred in refusing to give the 26th instruction requested by plaintiff in error, to wit:

"If you find from the evidence that the bell of the locomotive was ringing at the time that plaintiff approached the crossing and that the train was not running faster than six miles per hour, you should find a verdict for the defendant."

This instruction should have been given for the reason that the ringing of the bell was the usual method adopted by defendant in error in giving warning of the approach of its trains, and six miles an hour is less than half of the usual rate of speed of switch trains in plaintiff in error's yard, and there was certainly no negligence in running switch trains at six miles per hour; the only question of negligence on the part of plaintiff in error involved in this case is whether this train was running without warning and at a dangerous rate of speed.

VIII.

The trial Court erred in denying the motion of plaintiff in error for a judgment on the special findings of fact, for the reason that the said special findings are inconsistent with and contrary to the general verdict, in that the jury determined, by said special findings, that defendant in error was guilty of negligence which contributed to his injury, and that if defendant in error had not been guilty of such contributory negligence, and had exercised the care and precaution which an ordinarily careful man would have exercised under the circumstances, he could have avoided the injury.

IX.

It was error not to permit witness Geo. R. Blackwell to answer the question: "State as near as you can how far switch trains in that yard can be heard, supposing the train in good condition;" and in not permitting witness A. Wisnard to answer the question: "Wisnard, with a train running five miles an hour on a calm day, composed of the cars I have mentioned, to wit, caboose, two flat cars and two box cars, and engine, in passing over a frog, how far could that train be heard;" and in not permitting S. Ladd, an engineer, to answer the question: "State, Mr. Ladd, what distance the train running at the rate of five or six miles an hour and where it is passing over a frog on an ordinary calm day, could be heard?" For the reasons:

1. Experienced railroad men are better judges than ordinary jurors as to such matters.

2. Blackwell was accustomed to that yard and could speak from experience.

3. The matter is not, as ruled by the Court, within the common observation of all people.

X.

It was error not to permit S. Ladd, an engineer, to answer the question: "How fast do switch trains run in that yard, Mr. Ladd? What is their variance? What would be the greatest rate of speed in the yard and the usual rate of speed in the yard?" For the reasons:

1. The testimony shows that the plaintiff was

acquainted with that switch yard and of necessity knew the rate of speed that trains ran therein. He was bound to approach the crossing, when the view was partially obstructed, with caution proportioned to the danger.

2. The place where plaintiff was crossing was through the switch yard of the defendant. Plaintiff was bound to exercise such care and caution as would enable him to avoid the switch trains in that yard running at the usual rate of speed.

XI.

The trial Court erred in permitting witness W. R. Skelton to answer the question: "Do you know a street or public highway in Sprague called 'B' Street," for the reason that the existence of "B" Street was in issue, and it was for the jury to determine, upon competent testimony, whether or not there was such a street.

The question called for the opinion and conclusion of the witness.

XII.

The trial Court erred in giving instruction number 6, which reads as follows, to the jury:

"Although the accident may have occurred at a place within the defendant's switch yard, yet, if it was upon a public highway crossing said yard, then the defendant would be liable for failure to use the degree of care in approaching said highway with its train that I have indicated. If it was within the defendant's switch yard, but not upon a public highway, then the defendant would not be liable at all upon the case made here by the plaintiff. You are to determine from the evidence whether this place where this accident occurred was or was not a public highway. If the defendant threw it open to the general public as a crossing, and permitted the public to use it continuously for a number of years up to the time of the accident as a crossing, and by grading, putting down planking, and by other acts indicated its nature as a crossing, held it out to the public as such, then you would be justified in finding that the crossing was a public highway within the meaning of the law."

This instruction was erroneous for the reason that it submitted to the jury the question as to whether or not the place where the accident occurred was a public highway, when there was no competent testimony before the jury tending to show either the dedication and acceptance of such property as a public highway, or such immemorial usage thereof as a public highway as would amount to such dedication and acceptance.

XIII.

The trial Court erred in giving instruction number 1, requested by defendant in error, to the jury; said instruction reads as follows:

"No particular form or ceremony is necessary in the dedication of land for a public highway. All that is required is that the owner shall in some manner manifest an intention to dedicate it, and that the public shall accept the dedication."

This instruction is erroneous for the reason that it is misleading and prejudicial, there being no competent evidence before the jury on this subject.

XIV.

The trial Court erred in giving instruction number 2 to the jury, to wit: "Upon the question as to whether the defendant by its servants pushed its train down upon the plaintiff with such speed as to constitute that an act of negligence, and as to whether the defendant failed to give warning of the approach of its train, and was guilty of negligence therein, I instruct you that the defendant was bound to use such care in pushing its train over public highways, in the town of Sprague, as men of common prudence and intelligence would ordinarily use under like circumstances, taking into consideration the frequency with which the crossing was used by the public, the difficulties by reason of the situation and surroundings of the crossing in avoiding collisions and the results likely to ensue from collision, and that the absence of such care by the defendant in this case would make the defendant guilty of negligence for which the plaintiff may recover if he was injured thereby."

This is erroneous in the following particulars, to wit:

1. It submits to the jury the question as to whether the train was pushed "with such speed as to constitute that an act of negligence," while there was no evidence as to whether the speed of the train was unusual or unsafe, or such as to constitute negligence.

2. It assumes as conceded or established a controverted point, to wit: That the place where the collision occurred was a public highway.

3. It assumed that the plaintiff in error failed to

give due warning and run its trains at a rapid rate, that these acts themselves constitute negligence, and that the plaintiff could recover, notwithstanding he was guilty of contributory negligence.

4. It assumes that the train was pushed down on defendant in error. The testimony shows that the train was at its usual work in the switch yard, and that defendant in error attempted to cross that switch yard while the train was at such work.

XV.

The trial Court erred in giving the eighth instruction, which reads as follows, to the jury:

"If, however, the witnesses who testify differently to the same facts are all of them of equal candor, fairness, intelligence and truthfulness, and equally well corroborated by all the other evidence, and are upon equal footing as to interest in the result of the suit, then the preponderance of evidence as to that fact would be determined by the number of witnesses."

It is erroneous in the following particulars, to wit:

1. It ignores the fact that some witnesses might testify positively and affirmatively, and others doubtfully and negatively.

2. The word "intelligence," as used therein, is not limited to intelligence concerning the particular matter testified to.

3. It does not include equal experience, knowledge or information.

4. It furnishes to the jury an easy method of calculating on which side, in the judgment of the trial Judge, the evidence preponderates. The Judge thereby impresses upon the jury his determination of a fact which it is peculiarly their province to find.

XVI.

The trial Court erred in giving instruction number 16 to the jury; it reads as follows:

"If at any time before the plaintiff put himself across the track of the approaching train he was in a position he could have seen the train moving toward the crossing well enough to understand its movements and to avoid collision with it, but carelessly drove across the track without looking to ascertain its movements, then he was guilty of contributory negligence, which would prevent him from recovering in this action."

It is erroneous in the following particulars, to wit:

1. If the defendant in error could have seen the train he was bound to ascertain its movements before attempting to cross the track.

2. It should have been qualified so as to make it the duty of the defendant in error in crossing the track in the switch yard of plaintiff in error to avoid switch-trains running at the usual rates.

3. The words "well enough" are objectionable. If, in approaching the railroad crossing in question, defendant in error could see or hear the train, but

not "well enough" to understand its movements, he was bound to ascertain whether it was approaching the crossing or not. If, while in a state of uncertainty, he attempted to cross he was taking the chances and should abide the consequences.

XVII.

The trial Court erred in refusing to give instruction number 20, requested by plaintiff in error; it reads as follows:

"The defendant claims that there is evidence tending to show that the train was running so slow that the caboose which collided with the plaintiff's carriage did not move more than 25 feet after the collision, and that said train at said time of collision was not running to exceed six miles per hour; and if you find that the train did stop within 25 feet after the collision, and that it was not running at the time of said collision at a greater speed than six miles per hour, then you will find that the defendant was not guilty of negligence in running its train at too great a rate of speed."

Negligence was alleged in the too rapid running of the train; if the train did not move more than twenty-five feet from the place of collision, or was not running more than six miles an hour, it was the duty of the Court to determine, as a matter of law, that the rate of speed was not negligent.

XVIII.

The Supreme Court of the Territory of Washington erred in not reversing the judgment of the trial Court and in not directing that the motion of plaintiff in error for a non-suit be granted, for the following reasons:

(*a.*) The evidence adduced on behalf of defendant in error does not sustain the negligence charged in the complaint, namely: It does not show that the plaintiff in error was running its train without giving any warning and at a high rate of speed.

(*b.*) The evidence adduced on behalf of defendant in error shows that he was guilty of negligence, which contributed directly to his injury.

ARGUMENT.

POINT I.

Instructions Nos. 2, 7, 8, 3, 9, 23 and 26, requested by plaintiff in error, and refused by the trial Court, bore directly upon the principal issue on trial, viz., contributory negligence of defendant in error, and the refusal of the Court to give said instructions tended to mislead the jury and prejudice it against plaintiff in error.

The questions raised by the II., III., IV., V., VI., VII. and VIII. assignments of error are similar, and we will consider them together; in order to do this it will be necessary to make a brief resumé of the testimony:

Plaintiff Holmes, on cross-examination, testified that he moved to Sprague in April, 1882, and remained there almost continuously, working in defendant's shops and switch yard from that time down to within a few weeks of the time of the collision. That in going from his place of work to his hotel he passed several times a day through the switch yard of the defendant and over the place where the collision occurred. That at said time and at the time of the collision he was acquainted with the location of the switches in said yard and the side tracks. That on the day of and prior to the collision he went into the country with one White, each of them taking a bottle of whiskey. That they returned about four o'clock in the afternoon with both bottles nearly empty. That they and their friends during said day drank said whiskey. That he took five or six drinks. That he stopped 240 feet west of the place where the collision occurred and on the north side of Railroad Street, in front of White's saloon, for the purpose of enabling White to get out of the buggy, and from that point drove directly down Railroad Street to B Street, and thence across said railroad track.

That in driving from White's saloon down very nearly to the place where the collision occurred, the diagram and evidence of plaintiff shows that he would have a view of the switch train nearly all the time when said train was within 140 feet of the place where said collision occurred. It is conceded that the train in passing eastward before reversing and running back across B Street at the time of the collision, did not move eastward more than 140 feet. Plaintiff says that he saw the train which subsequently collided with him moving to the east after he had turned in front of White's saloon facing the track and the train, and supposed the same to be the switch train. That he drove his horses in a trot from the saloon to the planking, as shown on the diagram, and within 30 or 40 feet of the place where the collision occurred. That at that point he checked his horses to a walk for the reason that he "*thought there might be a train coming down*," and thence continued to walk his horses over said planking and until he saw the train. That during said time the wagons of Fish and Breslaun were passing to the north over said crossing, making some noise. That he listened, but did not hear either the bell or the rumbling noise of the train. That he listened while his horses and buggy and the wagons and teams of Fish and Breslaun were passing over said tracks and planking. He further says: "I was looking as soon as I came to a place where I could look."

Q. "Why did you look as soon as you came to a place where you could look?"

A. "I hardly know how to answer that question. It is supposed that any man would look when he thought that there might be possible danger."

Q. "You looked then as soon as you came to a place where you could look because you thought there might be possible danger?"

A. "Yes, sir."

Q. "You could not look until you got on to the track where you could not get away?"

A. "Until I got between the tracks, my horses were on the tracks."

Rec., pp. 76–82, 125–126, 149–150.

Fish, a witness called on behalf of the plaintiff, testified that he crossed track soon after the train passed to the east, and while he was yet on the planking going to the north he met the plaintiff crossing to the south, and at that time the yardmaster, Romick, was standing at the switch shown on the diagram west of and adjacent to the crossing, with his face turned to the east and beckoning and making the usual sign with his hand and arm for the train to back up. Said Fish further testified:

Q. "Did you say anything to Holmes as he went by you?"

A. "Yes, sir."

Q. "What did you say to him?"

A. "I said, 'look out, or those cars will catch you.' * * * He did not pay any attention to me at all, he was just looking straight forward."

Q. "At the time you spoke to him state whether or not your wagon was on the planking?"

A. "It was, yes, just going off the planking."

Rec., pp. 109–112.

Peterson, a witness for the plaintiff, testified that he was standing between the rails on the side track near the west edge of the crossing. That he called to Holmes and notified him as he was approaching, that the train was coming. That Holmes paid no attention to him, but drove right across the track.

Rec., 96, 98, 99.

Skelton, a witness for the plaintiff, testified that the yardmaster, Romick, after the wagons of Breslaun and Fish had passed over, walked rapidly to the east in the direction which the train had gone, after giving the signal for the train to back up, as testified to by Fish. That the train in backing up "*was running at its usual rate of speed in the switch yard.*"

Rec., pp. 51, 52, 54.

Slater, a witness called on behalf of the plaintiff, testified that he was handling and moving freight from the cars on the side-track to the freight-house. That he heard the rumbling noise of the coming train. That ordinarily that noise could have been heard four or five hundred feet up the track, but at that time could be heard from three to four hundred feet (Rec., p. 117).

The plaintiff Holmes further testified that he did not hear the warnings of either Fish or Peterson, although the testimony shows the warnings were given when they were each within 10 to 12 feet of him. Also testifies that he did not see signals given by Romick to back up the train, although there was nothing between Romick and himself to prevent his seeing. He further testifies that he was depending upon Romick to take care of him. Also that he did not hear the rumbling noise of the train, while Slater says that it could have been heard four or five hundred feet usually and three to four hundred feet on that day (Rec., pp. 149, 150, 76, 69).

The statement and opinion of the Supreme Court of Washington Territory, wherein said Court held that defendant in error was guilty of such contributory negligence as to preclude any recovery by him in this action, is such a concise statement of the facts of the case and the rules of law applicable thereto, that we deem it pertinent to quote extensively from said opinion:

" When the plaintiff closed his evidence, and the motion for the non-suit was made, it appeared from his own testimony, under the most favorable interpretation of it for him, and without any qualification, that the injury of which he complains was inflicted upon him by a switch train of defendant's cars, while he, in a buggy drawn by two horses, gentle and manageable, which he was driving, was crossing the main railroad track of the defendant, at a street crossing, upon the track grade, in defendant's switch yard, in the town of Sprague; that he was crossing the track from north to south, along a street at right angles or nearly so to the main track; that north of the main track, five or six feet from it, and parallel to it, was a side track running east and west a considerable distance each way; that on the side track, overlapping five or six feet upon the street, and extending eastward, stood a line of several box cars; that a little to the eastward of the street, and along the north side of the side track, was a depot with a platform to the west of it; that the crossing was planked, and that the planking extended northward, along the end of the depot platform and for the width of the street, to a distance of 25 or 30 feet from the main track; that the plaintiff approached the main track with his horses trotting at the rate of five or six miles an hour, and when about sixty feet from the track saw the train, consisting of two box cars, two flat cars, and a caboose, with a locomotive in the midst of them, and which did not look to him like a regular train, pass rapidly eastward over the crossing, and out of sight behind the box cars standing on the side track; that after this, owing to the position of the box cars, he saw and could see no more of the train until a few seconds before the collision, but he saw the yardmaster standing at a switch on the opposite side of the main track; that he continued driving at a trot till his horses came to the planking, where there was a little rise, to meet which he slowed them to a walk; that as soon as the train passed eastward, two wagons, each drawn by two horses, one team close behind the other, started from the opposite side of the main track, where they had been waiting, and crossed the track towards him, keeping together, and passed him as his team went over the planking, all six of the horses being on the planking at the same time; that, after reaching the planking, he kept his horses moving at a walk, without stopping, and without speaking to any one, and without hearing any whistle or bell or other noise of the train, though listening, until suddenly, as he got by the end of the standing box cars, he discovered the train close upon him, and whipped up his horses on the main track; and, as they sprang forward, heard a cracking, and knew no more till the doctor was working at his head. It further appeared from his testimony that, prior to the injury, he had resided in the town of Sprague eighteen months; had worked for the railway company in its car shops there nearly a year; was familiar with the crossing—had frequently crossed it going to and from his work, and was familiar also with the switch yard, and the location of the switches therein.

We think that this statement of facts, substantially as narrated by the plaintiff himself, clearly shows that he was guilty of culpable and contributory negligence, and that his case is not to be distinguished in principle from the multitude of cases in which the highest Courts of most of the States, and the Supreme Court of the United States have held, under analogous circumstances, the existence of contributory negligence to be a question of law for the Court and not one of fact for the jury. Beach, Contrib. Neg., Sec. 63; Chicago, B. & Q. R.R. *vs.* Lee, 68 Ill., 578, and 87 Ill., 454; Williams *vs.* Railroad Co., 64 Wis., 1., 24 N. W. Rep., 422; Flemming *vs.* Western Pac. R. Co., 49 Cal., 253; Salter *vs.* Railroad Co., 75 N. Y., 278; Railroad Co. *vs.* Depew, 40 Ohio St., 121; Haas *vs.* Grand Rapids & I. R. Co., 47 Mich., 401; 11 N. W. Rep., 216; Zimmerman vs. Hannibal & St.

Jo. R. Co. (Mo.), 2 Amer. and E. R. Cas., 191; Railroad Co. *vs.* Ritchie, 102 Pa. St., 425; Railroad Co. *vs.* Hunter (Ind.), 5 Amer. Rep., 214; Baltimore & O. R.R. *vs.* Hobbs (Md.), 19 Amer. and Eng. R. Cas., 337; Tucker *vs.* Duncan (U. S. Circuit Court, S. D., Miss.), 6 Amer. and Eng. R. Cas., 268, 9 Fed. Rep., 867; Schofield *vs.* Chicago, M. & St. P. R.R., 114 U. S., 615; 5 Sp. Ct. Rep., 1125; Kennedy vs. Chicago & N. W. Ry. Co. (Sup. Ct. Iowa, April, 1886), 27 N. W. Rep., 743.

Plaintiff's danger was greater, and called for greater caution, by reason of the interruption of his view. Chase *vs.* Maine Cent. R. Co., 5 Atl. Rep., 771; Schofield *vs.* Chicago, M. & St. P. R. Co., 2 McCrary, 268; 8 Fed. Rep., 488; Tucker *vs.* Duncan (*supra*).

If his view had not been obstructed, his duty would have been to look and see where the train was, and what it was about; and, if he did not, he would not have been entitled to damages if injured. (Beech, Contrib. Neg. *supra* and cases cited.) As his view was obstructed, he was in duty bound to do the nearest equivalent thing reasonably within his power, and likely to occur to a man of ordinary prudence so circumstanced; use the eyes of others who could see, by inquiring of them, or listen the more intently, and with greater precaution, using such reasonable and obvious means of making listening effective as would occur to an ordinary man. It would have been a reasonable, prudent and obvious thing for him to have inquired of either of the drivers of the two teams he met, or of the yardmaster, whether it was safe for him to venture to cross, or whether the train was coming. It would have been an obvious and prudent and reasonable thing for him to have waited till the transient noise of horse hoofs and wagons on the planking had subsided, or, at least, to have stopped his own team and silenced his part of the noise, so that he could listen to advantage. We are confident that an ordinary intelligent and prudent man would have done one or the other or all of these things, and that, if the plaintiff had been thus careful, he would not have been hurt. The noise on the planking was one which he knew he was helping to make, which he must have known would tend to prevent his hearing the train, and which was operating to prevent his hearing it, just as the standing box-cars were to prevent his seeing it. It was not some distant noise, recognizable as of no special significance, and for which the rumbling of the train might, notwithstanding ordinary care, be mistaken; nor was it a continuing noise, beyond his control, like the din of a factory; but it was a noise close to him, created in part by himself, and from which a few seconds of patience would wholly relieve him. If, as he approached the track, he had taken the precaution to listen as he ought, and had heard nothing, or to have inquired about the train, and had been answered untruly or not at all, his case would have been a very different one from what it is, and then might have been consistent with a verdict in his favor. But such is not his case. His injuries are proved out of his mouth, to be due largely or wholly to his own gross imprudence in not stopping and listening, or in not otherwise, up to the limit of ordinary good sense, making use of his wits to ascertain the whereabouts and attitude of the hidden train.

The rule, illustrated by the array of cases above cited, and requiring a traveller before trying to cross to look and listen attentively for a passing train, and, if necessary for the purpose, stop, is not a rule in favor of diminished liability in cases of collisions, but rather the contrary. It is a necessary and wholesome rule in favor of human life. There are human lives on railroad trains as well as in wagons. These lives must be preserved by just rules of law. One living in the vicinity of a railroad, at this day, must be presumed to be well aware of the terrible destructive energy active in a locomotive or stored up in a moving train. If such a person undertakes to drive a team across the railway, he must be presumed to know that he is going into a situation of great possible danger, and that a collision with his team is liable not only to kill him, but to derail a train and kill others. Should, through his negligence in crossing the track, an injury happen to an innocent passenger on the train, even though negligence of the employees of the railway company should have contributed to the injury, he or his estate would be liable to that passenger for full compensatory damages. If guilty of such negligence as would render him liable to an injured passenger, he would be guilty of such contributory negligence to any injury suffered by himself as would preclude his own recovery of any damages from the railway company." (14 Pac. Rep., 688.)

The case of *L. S. & M. S. Ry. Co.* vs. *Miller*, 25 Mich., 274, is very much like the case at bar; in that case plaintiff sought to recover for injuries sustained at a railway crossing, and the identical instructions which the trial Court refused to give in the case at bar, of which refusal we now complain, were given in said case and sustained by the Supreme Court of Michigan.

It was the duty of the plaintiff to approach the crossing with care and caution sufficient to avoid the collision with a switch train running at *usual rates*.

> *Continental Improvement Co.* vs. *Stead*, 95 U. S., 161.
> *Railroad Co.* vs. *Houston*, 95 U., S., 697.
> *Schofield* vs. *C. M. & St. P. Railroad*, 114 U. S. 615.

Plaintiff had reason to believe that the train which had passed to the east was the switch train working in the switch yard. He was bound to know that it might reverse at the first switch, 80 feet east of the crossing, and pass over the crossing much sooner than it did. He was bound to know that it might reverse at the second switch, where it did reverse and pass over the crossing at the exact time it did.

Under these circumstances it was his duty, if his view, as he claims, was partially obstructed and he could not determine where the train had reversed if at all, and there was a temporary noise obstructing his hearing, the rumbling noise of the train and ringing of the bell, to stop and listen, and if necessary to wait until that temporary noise had passed away. As to the duty of a traveler approaching a railroad crossing to stop and listen, there is a conflict in the authorities. That conflict is caused by the different circumstances presented. It is not the rule where a train is running fifty or sixty miles an hour, and the view unobstructed, for there it would be useless; but it is a rule wherever such stopping and listening is practicable, the view obstructed, and the speed at the crossing usual. Judge Hill, in the case of *Tucker* vs. *Duncan*, decided in 1881, in the U. S. C. C. for the Southern District of Mississippi, and reported in the 6th American and English Railroad Cases, p. 268, says:

"It is the duty of those desiring to make the crossing to use their powers of hearing and vision to ascertain whether or not there is liable to be a passing locomotive or train, and if so to stop until the danger is past. If there is no obstruction to either sound or vision, then the passer need not stop, but must use both faculties; but if there be such obstruction, then it is his duty to stop and both look and listen, and if he neglects to use these precautions, and a collision takes place, compensation cannot be given. * * * The petitioner knew the dangerous condition of the crossing, that the warehouse formed an obstruction to the sight and sound of the locomotive coming from the east, and also knew, or had reason to know, that it was the time for making up the train; it was therefore his duty before attempting to cross the track to both look and listen for the approach of the locomotive, and if need be to stop for that purpose."

Schofield vs. *C. M. & St. P. Railroad Co.*, 2d McCrary, 268.

In *Durbin* vs. *Ore. Ry. & Nav. Co.*, 17 Pac., 5, the Supreme Court of Oregon hold that where the facts show that plaintiff attempted to cross the railway crossing with a team; that she had just observed a passenger train pass, and was not expecting any other train at that time, although she had seen a freight train standing on the track, headed that way, in the town which she had just left; that the railroad at that point cuts through a hill so as to obstruct the view from the wagon road; that she was familiar with the crossing, having crossed there many times before, and had always used great care in looking for trains; that on this occasion she did not stop to look or listen; plaintiff was guilty of contributory negligence.

In *Hager* vs. *Southern Pacific R.R. Co.*, 33 Pac. R., 119 (decided May 18, 1893), the Supreme Court of California hold, that, one who approaches a railroad crossing in a city, at a jog trot, without slackening speed, or adopting any precautions, although he knows a train is about due, which by reason of obstructions, he will be unable to see until within a few feet of the crossing, is guilty of negligence such as to preclude a recovery for injuries received, although the train was running 30 miles an hour, and no signal was given.

In *Seefeld* vs. *Chicago, M. & St. P. Ry. Co.*, 35 N. W., 278, the Supreme Court of Wisconsin, after stating the facts of the case, and citing numerous authorities, at page 280, says: "The rule to be deduced from these cases is this: If the view of a traveler on the highway approaching a railroad crossing is so obstructed that he cannot see an approaching train in time to stop his team before colliding with it, if he knows that a train is due at such crossing at about such time, and if he is unable to hear the approaching train when his team is in motion, whether by reason of the force or direction of the wind or of noises in the vicinity, whether made by his own wagon or other causes, ordinary care requires him to stop his team and listen for the train."

In *Connelly* vs. *N. Y. C. & H. R.R. Co.*, 88 N. Y., 346–350, the Court says:

"But assuming that his misjudgment in attempting to cross in front of a train was not alone sufficient to charge him with negligence, on the ground that when he discovered the train, he was called upon to decide instantly what he should do, this furnishes no answer to his prior negligence in not having *stopped his horses* before going upon the track, whereby he would have avoided the peril which he afterward encountered."

In *Cinn., H. & D. R.R. Co.* vs. *Butler*, 23 A. &. E. R.R. Cases, 262, the Court holds, that where a crossing is particularly dangerous and requires extraordinary effort to ascertain whether it is safe to attempt to cross, one familiar with the locality and the danger surrounding it must use care in proportion to the probable danger. The fact that the approaching train did not give the statutory signal will not excuse one who sustained injury at a crossing if he neglects the diligent use of all available means to prevent such injury. "Manifestly, where obstacles interfere which obstruct sight and sound, it is the plain dictate of ordinary prudence that the traveler on the highway should approach the crossing with a degree of caution above that which would be required where no obstacles intervened."

The defendant cannot be held responsible because the switchman Romick did not warn the plaintiff from crossing the tracks. He was not there for the purpose of warning travelers on the street; he was there to attend to the switch.

In *Young* vs. *N. Y., L. E. & W. R.R. Co.*, 107 N. Y., 500, 505, the Court says: "There was a brakeman on the south track in or near the opening between the two parts of the standing freight train. The evidence on the part of the defendant is that the brakeman warned the plaintiff and attempted to arrest his progress. The evidence on the part of the plaintiff tends to show that the brakeman said nothing and made no sign to the plaintiff, and we must assume his evidence to be true. But it does not appear that the brakeman was stationed there for the purpose of warning travelers upon the street of the approach of trains upon the north track, or in any way for the protection of travelers. He was there simply for the purpose of connecting the two parts of the train when he should be signalled to do so, and hence he omitted no duty resting upon him in not warning the plaintiff.''

In *Tucker* vs. *Duncan*, 9 Fed. Rep., 867, it was held that where one attempts to drive his team over a railroad crossing on a level with the highway with knowledge of its dangerous condition; that a warehouse formed an obstruction to the sight and sound of a train coming from one direction; that it was time for making up a train, and that the locomotive must cross the crossing to do so, he must both look and listen for the approach of the locomotive, and, if need be, stop for that purpose.

In *McCrory* vs. *Chicago, M. & St. P. R.R. Co.*, 31 Fed. Rep., 521, in the Circuit Court, District of Minnesota, June 13, 1887, Mr. Justice Brewer ordered a verdict for defendant, stating that a man must look and listen when approaching a railroad crossing, and if, by looking or listening, he can ascertain the approach of a train, he is guilty of contributory negligence if he fails so to do. It appeared in this case that deceased, who was familiar with the crossing, while approaching defendant's tracks was killed by an approaching train, the view of which was obscured by smoke, but which he must have seen had he waited a moment for the obstruction to blow aside.

In *Fletcher* vs. *Fitchburg R.R. Co.*, 21 North. East. R., 302, Judge Knowlton, speaking for Supreme Court of Massachusetts, says: "As a general rule the person is not in the exercise of due care who attempts to cross a railroad track without taking reasonable precaution to assure himself, by *actual observance*, that there is no danger from approaching trains. It has been held in many cases that he cannot properly trust his sense of hearing alone, but must use his sight as well, if it is reasonably practical to do so. This rule has been held applicable where his view of an approaching train has been obstructed." See also cases cited in note at page 626, Vol. 39, A. & E. R.R. Cases.

"Where the view of the line from the highway is obstructed, or the crossing is in other respects specially dangerous, it is the duty of the traveler to exercise a higher degree of care, and if he cannot, by looking and listening, satisfy himself that it is prudent to cross the line, he must stop, or he must adopt such other precautions as ought to be taken under the particular circumstances of the case; thus, where the view of the line is obstructed it may be the duty of a traveler in a wagon to get out and lead his horse up to and over the crossing." Patterson on Railroad Accident Law, Section 177.

"A traveler is negligent in approaching and going upon a crossing in a wagon at a trot or at any rate of speed too great for him to stop his team readily should the circumstances necessitate it." Wood on Railway Law, Minor's Edition, 1894. Vol. 2, page 1522.

"If a traveler, by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw. Such conduct is held negligence *per se*." Beach on Contributory Negligence, 2 Ed., Section 182.

The Supreme Court of Maryland in 1884 said: "It is the duty of travelers before crossing the track of a railroad where the view is obstructed, to stop and listen for the approaching train before attempting to cross the rail, and if he fail to observe this precaution he forfeits all rights to recover for injuries received by the collision."

Maryland C. Railroad Co. vs. *Newborn*, 19 Am. & Eng. Railroad Cases, 261.
Pennsylvania Railroad Co. vs. *State of Md. to use of Geo. McGur et al.*, 61 Md., 108.

The Supreme Court of Maryland also in 1884 said, "That owing to obstructions the plaintiff could not see the track until he reached the crossing, and that then he could see for 100 yards toward the west, whence the train was coming. That as he approached the crossing he did not stop, but slackened his speed for a few seconds to listen; that he did not see the train; did not hear it; and heard no bell or whistle, and did not see the flagman until his horse was on the track; that after he slacked up he drove on and upon the track at the rate of four or five miles an hour. * * * The traveler has the obligation of prudence; he is bound to stop and look out for trains and may not rush heedlessly or remain unnecessarily upon the spot over which the law allows engines of fearful power to be propelled." And in that case, which is much like this, held that it was the duty of the plaintiff to stop and listen, and his failure to do so forfeited his right to recover.

B. & O. Railroad vs. *Hobbs*, 19 Am. and Eng. Railroad Cases, 337.

The Supreme Court of Pennsylvania, in 1885, said "the failure on the part of the traveler crossing a railroad track at grade to stop and look and listen, is not merely evidence of negligence, but negligence *per se* and a question for the Court."

Reading, &c., Railroad Co. vs. *Righter et al.*, 102 Penn. St., 425.

The Supreme Court of Indiana sustains the same doctrine. In the case of *Bellfontaine Railroad Company* vs. *Hunter*, 5th Am. Rep., 214, the Court said: "One approaching in a carriage, on the highway, the crossing of a railroad, over which express trains at a high rate of speed are frequently passing, may reasonably be required to assure himself, if he can, by the use of his organs of sight and hearing, that no cars are in dangerous proximity. If the use of such means would give the information, he may properly be charged with such knowledge. If necessary to make such observation, he will be required to reduce the rate of speed at which he is moving, or even to stop his conveyance."

The Supreme Court of Michigan said: "It is vain to urge that prudent or ordinary precautions were made use of in this case. To move forward directly, as decedent did, from a point whence an approaching train would not be seen, at a time when it was known to him that the train was due, and not to pause until the train was encountered, was so far from being ordinary prudence, that it approached very nearly to absolute recklessness."

Haas vs. *Cedar Rapids and Ind. Railroad Co.*, 47 Mich., 401.

L. S. & M. S. Railroad Co. vs. *Miller*, 5th Am. Railroad Reports, 478.

The Supreme Court of Missouri said that the following instruction should have been given by the lower Court: "It was the duty of the plaintiff when he arrived at the track of the defendant's railroad, at the crossing described in the petition, to stop and look and listen and ascertain whether any train was approaching, before he stepped upon said track."

Zimmerman vs. *H. & St. J. Railroad Co.*, 2d Am. and Eng. Railroad Cases, 191.

The Court in the same case further says: "That it is the duty of a citizen approaching a railroad track, to look and listen for an approaching train before venturing upon it, is we think well settled; but, in those cases in which it has been held as a matter of law that the traveler should stop and look and listen, the parties were traveling in wagons or other vehicles, which made a noise that would necessarily interfere with their hearing approaching trains."

This same rule was applied by the Supreme Court of California in a case much like the case at bar. In the California case the plaintiff was preceded a short distance by two other wagons, which together with the plaintiff's wagon raised a cloud of dust, and made considerable noise as they approached the railroad track. The plaintiff checked when within 25 yards of the road from a trot to a walk, to listen, but did not stop. He heard neither the rumbling noise of the train nor the sound of the bell. The Court in that case said that it was not easy to conceive of grosser negligence than that of a person driving a wagon with four horses when approaching a railroad crossing with which he is perfectly familiar and which he intends to pass, while the atmosphere is so completely filled with dust that he cannot see the fence within a few feet of him, to attempt to cross without even stopping his team to listen for an approaching train. If his vision was so obscured by dust that he could not see the train when within 50 feet of him, the most ordinary prudence would have suggested the necessity to stop his team, that he might listen under the most favorable circumstances to ascertain whether a train was approaching. If the plaintiff had pursued this course there could be no question but that he could have escaped this collision. But the plaintiff testified that his wagon made some noise, and every one knows that a four-horse team attached to a road wagon traveling in a trot on an ordinary road will produce sufficient noise to seriously obstruct the hearing of the driver, and when going in a walk, though the noise may be less, it will necessarily be sufficient to impede the hearing to a considerable extent. As the plaintiff could not use his eyes with effect, it was incumbent upon him, as a person of ordinary prudence, to make the best use of his ears, which he could not do while his team was in motion. Upon the plaintiff's statement of the facts, we hold that he was guilty of contributory negligence, in failing to stop his team to listen for an approaching train."

Fleming vs. *U. P. Railroad Co.*, 49 Cal., 253.

The Supreme Court of Illinois, in the case of *C. B. & Q. R.R.* vs. *Lee*, 78th Ill., 454, sustained the following instruction: "If from a raise in the ground or other obstructions, or if, by reason of a defect of his sense of sight or hearing, he cannot determine with certainty, whether or not a train of cars is approaching without stopping, and if necessary, going in advance of his team to examine, it is his duty to do so. If, in such case, he goes upon the track without taking such precaution, he does so at his own peril, and cannot recover if injury results."

Sackett on Instructions to Juries, 285.

The same rule obtains in Wisconsin.

See *2d Rorer on Railroads*, 1067.

Rothe, Admr., vs. *Milwaukee, &c., Railroad Co.*, 21 Wisconsin, 258.

See also *Thompson on Negligence*, pp. 426, 427.

Also in Iowa. *Haines* vs. *Illinois Central Railroad Co.*, 41 Iowa, 231.

And New Jersey. *Morris & Essex Railroad Co.* vs. *Hoslan*, 33 New Jersey, 147.

And Minnesota. *Monroe* vs. *C. M. & St. P. Railroad Co.*, 19 Am. and Eng. Railroad Cases, 362.

"It is negligence and should be so ruled by the Court without reference to a jury for a person to attempt to cross a railroad in a vehicle without stopping to look and listen for trains."

2d Rorer on Railroads, 1061.

Beach on Contributory Negligence, 192, says: "In attempting to cross, the traveler must listen for signals, notice signs put up as warnings and look attentively up and down the track. A multitude of decisions of all the Courts enforce this reasonable rule. *He must even come to a halt for that purpose.*"

Wilds vs. *Hudson River Railroad Co.*, 29 New York, 315.
Schulze vs. *Penn. Railroad Co.*, 5 Reporter, 376.
Weeks' Damum Absque Injuria, p. 273, Sec. 132.
Field on Damages, p. 166.

Dr. Pomeroy testified that the liquor that Mr. Holmes drank on that day prior to the collision would dull his sense of hearing, shorten his vision and tend to make him incautious. This testimony accounts to a great extent for the defendant in error's failure to hear the warning given by Fish and Peterson, and his failure to see the signal given by Romick for the train to back. But it was his fault that he was in that condition, and the fact that his hearing was deadened and his vision dulled, required him to exercise greater care and caution than otherwise would have been required, and made it his duty to stop and listen and look in a case where, if he was in full possession of his senses of hearing and seeing, it would not be necessary for him to do so.

1 Thompson on Negligence, 450.
Illinois Cent. Railroad Co. vs. *Hutchinson*, 47 Illinois, 408.
H. & T. C. Railroad Co. vs. *Smith*, 52 Texas, 178.

In *Ward* vs. *Richmond & D. R.R. Co.*, 43 Fed. Rep., 422 (decided August 26, 1890), where plaintiff attempted to drive over defendant's track at a street crossing without stopping to look or listen, and was struck by a passenger train, the Court says: "In his examination plaintiff admitted that he had been drinking on that day, and that at the time of the accident he was neither drunk or sober. Had he listened he must have heard the whistle or the roar of the train. It is impossible to avoid the conviction that, although he was neither drunk or sober, nevertheless the drinks he had taken had induced a frame of mind which made him careless and indifferent to consequences, and had led to the absence of the care which a sober man, however careless and indifferent, would have exercised under the circumstances. Had he used his senses he could have stopped. By not stopping he contributed to his injury."

The testimony adduced on behalf of defendant in error shows that he could have seen the approaching train at a time when he was 20 feet from the track and the train was 40 feet from the crossing. The proof shows that the train was running six miles an hour and the horses of the defendant in error were walking at the rate of four miles an hour, without any obstructions whatever on his right and to the west to prevent his turning in that direction and moving faster than the train, or stopping his horses before he reached the track, and it was negligence in him not to do so.

> *Railroad Co.* vs. *Beale*, 6th American Railway Reports, 158.
>
> *Lake Shore Railroad Co.* vs. *Miller*, 5th Am. Railway Reports, 488.
>
> *Haines* vs. *Illinois Central Railroad Co.*, 41st Iowa, 230, 231.
>
> *Salter* vs. *Utica & B. Railroad Co.*, 75 New York, 278.
>
> *Pennsylvania Railroad Co.* vs. *Righter*, 42 New Jersey Law, 180.

Defendant in error testified that he relied upon Romick to protect him. If that testimony is true, it was his duty to look to Romick and watch for signals and warnings. Notwithstanding this, it is conceded that while Romick was in full view and forty feet of Holmes, he signaled the train to back up, and there was nothing whatever to prevent the defendant is error seeing that signal. His testimony that he did not see it establishes, either that he was incautious and not paying attention, which is negligence, or else he testified untruly. In such a case his testimony constitutes no conflict, and the Court must find that he saw the signal and heeded it not.

> *C. C. C. & Indianapolis Railroad Co.* vs. *Elliott*, 14th Am. Railway Reports, 123.
>
> *Lake Shore & Michigan Southern Railroad Co.* vs. *Miller*, 25th Michigan, 274.

Failure of the plaintiff in error to give warning of the approaching train will neither justify nor excuse the failure of defendant in error to stop or look or listen.

Schofield vs. *Chicago, Milwaukee & St. Paul Railroad Co.*, 2d McCrary, 268.

Schofield vs. *Chicago, Milwaukee & St. Paul Railway Co.*, 114 U. S., 615.

Houston vs. *Railway Co.*, 95 U. S., 697.

Kelley vs. *Hannibal & St. Joseph Railroad Co.*, 13th Am. and Eng. Railroad Cases, 639.

In *Cullen* vs. *Del. & Hudson Canal Co.*, 113 N. Y., 667 (decided June 4, 1889), the Court of Appeals of New York holds that the neglect of the employees of a railroad company to ring the bell or blow the whistle of an engine approaching a crossing, does not excuse a traveler on the highway from exercising care on his part, in looking and listening before crossing the railroad tracks, in order to escape the danger of moving trains. "We think the judgment of the General Term should be reversed and the judgment of nonsuit affirmed."

See also to same effect:

Dunning vs. *Bond*, 38 F. R., 813.

In *Chicago, R. I. & P. R.R. Co.* vs. *Chrisman*, 34 Pac. R., 286 (decided Oct. 2. 1893), the Supreme Court of Colorado holds, that failure to ring the bell or blow the whistle at a crossing, as required by law, does not render a railroad company liable for an accident at a crossing, unless that be the proximate cause of the injury, and there be no such negligence on the part of the person injured as to prevent his recovery. Where the view of the track from the highway is obstructed, or the crossing is in other respects especially dangerous, it is the duty of a traveler, aware of such facts, to exercise a higher degree of care than when the view is unobstructed, and if he cannot otherwise satisfy himself that it is prudent to cross, he must stop and listen before driving on the track. Failure to give the statutory signals or running the train at a too rapid rate of speed, does not excuse negligence on the part of one injured on a railroad crossing.

We submit that the evidence adduced in this case, under the rule laid down by this Court in 2 U S 77: → *St. Louis & S. F. Ry. Co.* vs. *Schumachar*, decided March 5, 1894, establishes conclusively contributory negligence of defendant in error. A few hours before the collision he, with a friend by the name of White, left Sprague in a buggy for a short trip into the country, each of them taking a bottle of whiskey. They returned about four o'clock in the afternoon with each bottle nearly empty. The defendant in error left White at his saloon, which is about 300 feet from the place where the collision occurred. From that point the plaintiff drove directly down to the crossing and to the place where the collision occurred. In driving down Railroad Street, and from that point to the place where the collision occurred, Engineer Wishard and Deputy Sheriff Maloney testified that they, riding in a buggy which was four feet six inches in height from the top of the seat to the ground (this was six inches lower than the buggy in which the defendant in error was riding at the time of the collision), made experiments, first with the train 140 feet east of the crossing (and it is conceded that this is the point where said train reversed and ran back), and that the train could be seen all the way from White's saloon down to within 40 feet of the place of collision, and there the view was obstructed by the box cars until within 25 feet of the place where the collision occurred, and from this 25-foot point an approaching train could have been seen all the time until the collision occurred. And that the said Wishard and Maloney had the train moved down so that it was 70 feet east of the place where the collision occured, and made the same experiments. They drove from White's saloon along Railroad Street down to and over the crossing, and made measurements. They testified that the train could have been seen at the point last named all the way from said saloon down to the place where the collision occurred, with the exception of a space of about 18 feet, commencing something like 40 feet from the place where the collision occurred, terminating some 22 feet from said place. That at all other points along the line where Holmes traveled, with the exception of that 18 feet, he could have seen the train when it was both going east and returning to the place of collision. This testimony is entirely uncontradicted except by the testimony of Holmes, Nelson and Skelton. Holmes does not pretend to say that he ever made any experiments or took any observations to ascertain from what portion of the route he could have seen the approaching train. He says he did not attempt to look over the box cars to see the caboose or the pilot of the caboose. Doctor Pomeroy testified that the liquor that

Holmes had drank on that day would materially affect his vision. So that the testimony of Holmes is entitled to but little consideration on that point, first, because he did not look; second, if he had looked his vision was impaired so that he might not have seen. Skelton in his testimony says: "I think I have made observations," and that the train could have been seen for a short distance from White's saloon. It is apparent from his testimony that he was uncertain whether he had ever made any observations or not. Nelson testified that he had made observations, but under what circumstances is not shown. There is not sufficient in the testimony of the defendant in error to present even a conflict as to whether or not the train could have been seen by Holmes as he was approaching the place where the collision occurred.

Culhane vs. *New York Central Railroad Co.*, 60 New York, 197.

The jury were asked the following question: "When the plaintiff was 100 feet from the crossing where the collision occurred, for what space between said point and said crossing was the view of said train obstructed," and the jury made the following answer thereto: "From our observations since the grading or filling in of the street since the time of the accident, we think there was a space of 20 or 25 feet that the plaintiff could not have seen the train after it had passed east over the crossing, and that space was at a point 45 or 50 feet from the place of the accident north of crossing."

If this is to be considered an answer to the question propounded, the only deduction therefrom, interpreted in the light of the testimony, is that Holmes could have seen that approaching train all the time with the exception of about 25 feet. The distance, 100 feet, was selected for the purpose of bringing this case as nearly as possible within the case of Schofield *vs.* Chicago, Milwaukee & St. Paul Railroad Co., 114 U.S., 615. When that case was tried in the Circuit Court, Judge McCrary found that Schofield from a point 100 feet from the crossing to the crossing had an unobstructed view of the approaching train.

The train was an irregular one and running at the excessive and unusual rate of fifty miles an hour without giving the customary or any signal of its approach to the crossing. In that case the Circuit Judge held that the failure of Schofield to look where he could have seen, was such contributory negligence as entitled the railroad company to a non-suit, which was accordingly granted. In sustaining that ruling the Supreme Court of the United States said: "In view of the duty incumbent on the plaintiff to look for a coming train before going so near to the track as to be unable to prevent a collision, and of the fact that he was at least 100 feet from the crossing when the train passed the depot, and could then have seen it if he had looked, and have avoided the accident by stopping until it had passed by, he was negligent in not looking."

In considering the question of contributory negligence it is material to remember that Holmes was approaching the place where switch and other trains passed several hundred times daily; that he knew that the switch train was working in the yard; that the first switch was eighty feet east of the crossing, the train was as liable to reverse there as at any other switch; when there was some noise to interfere with his hearing the warnings and the rumbling of the train; when he had been drinking intoxicating liquor, and that the amount that he had drank might possibly dull his sense of hearing and sight, and that he "*thought there might be a train coming down.*" Under such circumstances he was bound to see or hear the approaching train if it could have been seen or heard.

It will be conceded that when Holmes was within 20 feet of the north rail of the track upon which the collision occurred he could see the approaching train. If he failed to see it at that point, and failed to drive at that point at such a rate of speed as would enable him to stop and avoid a collision, he was guilty of negligence contributing to the injury.

In the case of *Railroad Company* vs. *Beale*, 6 American Railway Reports, 158, the Supreme Court of Pennsylvania said: "It is uncontradicted that there was a level piece of ground about ten feet wide, between the hill or bluff and the first track or siding on the approach to the track from the valley upon which the deceased was traveling. It was his plain duty to have stopped at that place, and so the learned Judge instructed the jury, but he qualified this instruction by adding, 'if you find that from the evidence that the approaching train might have been seen or heard from there.' This, in fact, left the question of negligence to the jury, upon a point not material. Indeed the duty of stopping is more manifest when an approaching train cannot be seen or heard than where it can. * * * * There never was a more important principle settled than that in the fact of the failure to stop, immediately before crossing a railroad track, is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the Court."

In the case of *Union Pacific Railroad Company* vs. *Adams*, the view was obstructed to within 18 feet of the track, then that 18 feet unobstructed. The Court held that it was the duty of the traveler to see the approaching train within that 18 feet, and to proceed at such a rate of speed as would enable him to avoid a collision with a train running at usual rates, and his failure so to do was negligence *per se*. 19th Am. & Eng. R.R. Cases, 176.

In the case of *Haines* vs. *Illinois Central Railroad Company*, 41 Iowa, 227, the view was obstructed to a point 17 feet from the place where the collision occurred, and from that point it was unobstructed, and the Supreme Court ruled that the traveler was guilty of contributory negligence in not seeing what he might and ought to have seen. In that case the Court below refused the following instruction: "12. If you find from the evidence that the plaintiff, knowing the position of the railroad track, and that trains were run frequently thereon, approached the crossing without looking in the direction from which the train was coming, and without stopping his team to listen for an approaching train, so closely that he was unable to stop his horses before getting upon the track, and in consequence thereof the collision occurred, the plaintiff cannot recover in this action." The Supreme Court said that the refusal of that instruction was error, and therefore reversed the case.

In the case of *Salter* vs. *Utica & Black River Railroad Company*, 75 N. Y., 273, the view was partially obstructed to within 21 feet of the track, the Court said, "Assuming that he was within 25 or 30 feet of the rail when he first heard the train, he still had an opportunity to look up and down to see if the cars were approaching. If he had been traveling on a slow trot it would have been an easy matter to hold up his horses and stop for the train to pass. At any rate he was bound to look where he was, and in failing to do so was clearly negligent even at such a distance. Unless horses are driven at an extraordinary rate of speed there could be no difficulty in exercising proper control over them; *and no prudent man would drive a team so near without looking to see whether the train was near, or so fast as to be unable to control them. The distance at which a person crossing may be from the track, is not important so long as there is a chance and opportunity to take an observation.*"

In the case of *Lake Shore & Michigan Southern Railroad Company* vs. *Miller*, *supra*, the view of the road was obstructed to within 26 feet of the south rail of the crossing. In that case the Supreme Court said that the traveler was bound to look at that point, and approach the unobstructed place with such care and caution as to stop if a train was approaching.

5 *American Railway Reports*, 488, 489.

In the case of *Bellefontaine, &c.*, vs. *Railroad Co.* vs. *Hunter*, the view was obstructed to a point 30 feet south of the crossing. The train in that case was running between 30 and 40 miles an hour, yet the Court decided that the traveler was bound to approach with such care and caution as would enable him to stop within said thirty feet.

33 Indiana, 335.

The Supreme Court of New Jersey, in the case of the *Pennsylvania Railroad Company* vs. *Righter*, said: "Now it clearly appears that whatever obstruction there was to prevent a view of the track to the south at any point on Fairmount Avenue from Walnut Street to the caution post, yet when Deany came opposite that post, and while still more than 30 feet from the middle track, he had a clear field for observation. He says his horses were gentle. He says he was driving at a jog-trot. I am unable to see any reason why, if he had used his eyes with any degree of care, he could not have seen the approaching train in time to arrest the progress of his carriage and avoid the collision. It was his duty to approach the track with caution, and to have his horses at such a gait and under such control as would allow him to arrest their movements at once. Deany himself does not say that he looked at that point. There is, however, the testimony of three witnesses, who say that they saw him look, but such testimony cannot aid the plaintiff where it is clear that, if he had looked with *care*, he must have seen the train. If a traveler, says Dr. Wharton, by looking along the road could have seen an approaching train in time to escape, it would be presumed, in case of collision, that he did not look, or, looking, did not heed what he saw."

42 New Jersey Law, 187.
Wharton on Negligence, Sec. 382.

Holmes could and should have heard the rumbling noise of the approaching train.

Fish, a witness for defendant in error, mentions the fact that the cars approaching made some noise. Slater, also a witness called for defendant in error, testified that he heard the rumbling noise of the train, and further, "that in ordinary cases the rumbling noise of the train could have been heard from four to five hundred feet from the track, but on that day I suppose I could have heard it three or four hundred feet." (Rec., p. 117.)

Two questions were propounded to the jury in relation to the distance that Holmes could have heard the approaching train:

1. "At what distance from the place where the collision occurred could the plaintiff have heard the rumbling of the moving train if he had stopped and listened after the wagons of Fish and Breslaun had passed over the crossing?"

"We judge from one hundred to four hundred feet."

2. "At what distance from the place where the collision occurred could the noise of the train be heard if the bell was not rung?"

"From fifty to two hundred feet, in our judgment." (Rec., p. 33.)

In relation to the testimony stated above there was no conflict, and these answers, although not as strong as they should have been upon the evidence, show conclusively that the defendant in error, if he had stoppod 100 feet from the place where the collision occurred, could have heard the rumbling noise, and without stopping could have heard when he was 50 feet distant from the place where the collision occurred.

The rule is an uniform one that if the traveler could have heard by listening attentively and carefully, and failed so to do, and a collision ensued in consequence thereof, that such traveler is guilty of contributory negligence.

The proof further shows that Holmes, when within 40 feet of the place where the collision occurred, was notified that the train was approaching by Fish and Peterson at a time when they were within ten or twelve feet of him. Romick, the yardmaster, was at the crossing. Fish testified:

Q. "What was he (meaning Romick) doing there?"

A. "He had turned the switch and was motioning his hand that way (indicating) to back up, I thought."

Q. "Which way was he looking?"

A. "Looking east."

Q. "Did you notice whether he was looking north any?"

A. "He was looking at the train at the time."

Q. "Where were you when you saw the person at the switch making the motions that you gave?"

A. "That was after I had passed Holmes and was looking around watching Holmes as he was going across."

Q. "Well, that man that gave that motion you saw was standing at that switch at that time?"

A. "Yes, sir."

Q. "How far from him at the time the motion was made was Mr. Holmes?"

A. "I could not say, exactly. I should think forty to fifty feet."

Q. "Did you say anything to Holmes as you went by?"

A. "Yes, sir."

Q. "What did you say to him?"

A. "I says, 'look out or those cars will catch you.' "

Q. "What did he say in reply thereto?"

A. "He said nothing."

Q. How far were you from him when you gave him that warning?"

A. "He was just going past me, probably ten or twelve feet."

Q. "You say he did not look up?"

A. "He did not pay any attention to me at all, he was just looking straight ahead."

(Rec., pp. 111–112.)

The entire testimony establishes the fact and the jury so found that there was nothing to prevent Holmes seeing the signal given by Romick for the train to back up. The testimony further shows that Romick, after giving that signal, left the switch and passed the rear end of the wagon of Breslaun and walked to the east. Holmes says that he expected Romick to take care of him. It was his duty then to look to Romick for signals, and at the very time that he should have been looking, Romick was looking to the eastward away from Holmes and signaling the train to back up, which would necessarily bring the train in collision with Holmes' carriage if he kept his course, yet Holmes says he did did not see that signal. But one conclusion can possibly be drawn from the failure of Holmes to hear the warnings given by Fish and Peterson and to see the signal given by Romick, and that is that his hearing and sight were both impaired by the liquor he had drank on that day.

Dr. Pomeroy testifies in relation to the effect upon Holmes of the liquor he had drank on that day, as follows: " Well, it would produce a dimness of vision and a roaring noise in the ears, I should think. I am certain that it would, and the functions of the brain are partially suspended, he is not himself. None of his senses are as acute if he has indulged to any extent."

(Rec., p. 195.)

Even in the State of Illinois, where the doctrine of comparative contributory negligence is followed, the Courts hold that if a traveler approaches a crossing where the view or the opportunities from any cause for hearing are obstructed, when his sense of sight or hearing is impaired, that it is contributory negligence on his part not to stop and listen.

Chicago, &c., Railroad Co. vs. *Lee*, 87 Illinois, 454.

Sackett on Instructions to Juries, 285.

POINT II.

The special findings of fact show conclusively that defendant in error was guilty of such contributory negligence as to preclude recovery, and the Court should have granted plaintiff in error's motion for a judgment on said special findings.

There were a large number of special questions submitted to the jury, but for the purpose of this assignment it is only necessary to refer to a few.

The jury found that Holmes had knowledge of the crossing where the collision occurred; that he knew it was in the switching yard of plaintiff in error; that switch trains could be heard from 50 to 200 feet from place of collision, even if the bell was not rung; that if Holmes had stopped and listened he could have heard the noise of the switch train from 100 to 400 feet from the place of collision, notwithstanding the noise made by the wagons of Fish and Breslaum on the crossing. The jury also found that the train, at the time of the accident, was running at the rate of six miles an hour; that Holmes saw the train pass toward the east prior to the collision, and that he knew it was a switch train. The jury also found that, just prior to the collision, the yardmaster, standing in plain sight of Holmes on the crossing, made the usual motion for the train to back down, and that there was nothing whatever to obstruct Holmes' view and prevent him from seeing the motion.

The jury found that the collision occurred on a calm clear day at about four o'clock in the afternoon (Finding Nos. 11 and 12); that the train which collided with defendant in error's buggy could have been seen all the way from a point 100 feet from the crossing up to a point 50 feet from the crossing, when it was lost from view for a distance of 25 feet, coming into view again at a point 25 feet from the crossing (Finding No. 47); that defendant in error trotted his horses, which were gentle and manageable, at the rate of 5 miles an hour up to a point 25 feet from the crossing, from which point he walked them on to the crossing at the rate of 4 miles an hour (Findings Nos. 43 and 44). In the time consumed by defendant in error in walking his horses to the crossing at this rate of speed the switch train, running at the rate of 6 miles an hour, would run just 37.48 feet; therefore, when 25 feet from the crossing, defendant in error, with a pair of gentle and manageable horses walking at the rate of four miles per hour, drove deliberately on to the crossing, when the switch train moving at the rate of 6 miles an hour was in plain view only 37.48 feet from the crossing.

Any view of this situation which it is possible to take shows beyond doubt that defendant in error, by his own negligence and utter disregard of his imminent danger, brought upon himself the injury of which he complains. If he had looked, the train was in plain view only 37 feet from the crossing, moving towards the crossing at the rate of 6 miles an hour, and he was 25 feet from the crossing, walking a pair of horses under full control and could easily have stopped his team and waited until the train had passed, thereby avoiding the danger; if he did not look and did not see the train, he was equally negligent and careless and exhibited such an utter disregard for his own personal safety as to preclude any recovery in this action.

The jury also found, specially, that Fish and Peterson warned defendant in error of the danger, but that he did not hear the warning.

These special findings that defendant in error drove deliberately on to a railroad crossing from a point 25 feet distant from the crossing, with a train in plain view, only 37 feet from the crossing, moving at the rate of six miles an hour, and that he did not hear the warnings shouted to him by two lusty, able-bodied men only 12 feet distant from him, are all inconsistent with any hypothesis, except that defendant in error, with his senses of sight, hearing and perception, blunted by the whiskey he had drank on that day, not only saw and heard the train, but negligently and carelessly disregarded his imminent danger and drove directly on to the crossing when he could have avoided all danger by simply stopping his horses, which he could easily have done, and permitting the train to pass.

The 38th question submitted to the jury was: "38th. Could the plaintiff have avoided the collision by stopping and listening;" the answer returned by the jury was: "Yes, if he had stopped at a safe distance."

(See Rec., pages 5, 6 and 7.)

The statutes of Washington Territory provide that when special findings of fact by a jury are inconsistent with the general verdict rendered by the jury, the special findings shall control and the Court shall enter judgment in accordance with the special findings.

(*Hill's Stat. of Wash.*, Vol. 2, Sec. 376.)

It is impossible to harmonize the general verdict rendered by the jury with these special findings; special finding No. 38 amounts in itself to a finding for plaintiff in error. We have cited in this brief a large number of cases showing that it is the duty of a person approaching a railroad crossing, especially a crossing situated as this one was, to stop and listen for approaching trains, and that if he does not so stop and listen and is injured in attempting to cross the track, he is guilty of such contributory negligence as to preclude recovery; the finding by the jury that he could have avoided the collision if he had stopped and listened is conclusive of this case, and the Court should have directed a verdict for plaintiff in error on said special finding number 38 alone.

In addition to these findings however, we desire to direct special attention to special findings number 13 and 24; in number 13, the jury found that Holmes could have heard the noise of the train, even if the bell were not rung, from 50 to 200 feet from where the collision occurred; and in number 24 the jury found that the switch train was running at the rate of six miles an hour at the time of the collision; the only negligence alleged in the case on the part of plaintiff in error was that it was running its train at a negligent rate of speed and without giving warning of its approach. Defendant in error, by the testimony of his own witness, shows that the usual rate of speed of switch trains in plaintiff in error's yard was from 12 to 15 miles an hour, and that he was familiar with this rate of speed; we submit that this finding by the jury that the train was running at the rate of six miles an hour, less than one-half the usual rate of speed, clearly and conclusively shows that it was not running at a negligent rate of speed.

Special finding number 13, that defendant in error could have heard the train from 50 to 200 feet from the crossing, even if the bell were not sounded, disposes of the alleged negligent failure to give warning of the approach of the train; for if defendant in error could have heard the train from 50 to 200 feet from the crossing, even if the bell were not rung, certainly the failure to ring the bell, admitting that it was not rung, was not the proximate cause of the injury.

We submit that findings number 13 and 24 establish conclusively that there was no negligence on the part of the plaintiff in error which was the proximate cause of the injury, and that Holmes, by his own negligence, contributed to his injury.

For the reasons stated, the trial Court should have set aside the general verdict and entered a verdict for plaintiff in error on the special findings.

POINT III.

It was prejudicial error of the trial Court not to permit plaintiff in error to show by locomotive engineers, familiar with the train and the yard, at what distance from the place of the accident the train could have been heard.

Defendant's counsel asked Engineers Blackwell, Wishard and Ladd to state the distance a switch train, and especially the one in question, at the time of the collision, could be heard in the Sprague yards, running as switch trains usually run in that yard, supposing the train and everything in good condition. The Court sustained the objection to each of said questions on the ground that the matter was within the common experience of everybody, and not a matter to which an expert could testify.

The testimony was admissible even conceding the points passed upon by the Court. It comes within the class of cases where it is impossible to convey to the jury the vibrating atmospheric and other conditions and influences with such certainty as to enable them to form even a reasonable opinion as to the distance the rumbling noise of the train, could be heard, and is within that class of cases where opinions of non-professional witnesses are admissible.

Rogers on Expert Testimony, pp. 5, 6, 90, 91, 145, 146, 147 and 113.
People vs. *Earnest*, 45 California, 29.
Row vs. *Diller*, 45 Illinois, 486.

B~~u~~eller vs. *Jones*, 22 Arkansas, 92.
Clark vs. *State*, 12 Ohio, 483.
State vs. *Hayden*, 51 Vermont, 296.
Southerland vs. *Hawkins*, 56 Indiana, 343.
Williamson vs. *Pierson*, 23 Pennsylvania State, 117.
Lawson on Expert Testimony, p. 87.
Cooper vs. *Railroad Company*, 44th Iowa, p. 140.
Terre Haute and I. R. R. vs. *Clark*, 6th American and Eng. R.R. Cases, 84.

POINT IV.

Negligence was alleged in running the train too rapidly, and the trial Court should have permitted plaintiff in error to show by its employees, who ran trains in the yard, the usual rate of speed of trains therein.

The question was propounded to S. Ladd, engineer, "How fast do switch trains run in that yard, Mr. Ladd, what is their variance; what would be the greatest rate of speed in the yard; what is the usual rate of speed in the yard?" Mr. Andrews, counsel for plaintiff, made the following objection and no other to this question: "Our objection is that it does not make any difference what the usual rate of speed was. The witnesses have all testified to the rate of speed on that occasion. Their witnesses have none of them placed it over five miles an hour. I do not wish to have any contention, but if they were to show a rate of speed that would be dangerous to human life and limb, I think it would be improper to show it. They have no right to show a custom that is dangerous to anybody, especially on a highway.'' The Court erred in sustaining said objections for the reasons:

Defendant was not seeking to show a dangerous rate of speed, but the usual rate, and the variance in the rate. It is conceded that the plaintiff at and for a long time prior to the collision was familiar with the running of the trains in the defendant's switchyard, and especially at the place where the collision occurred; the plaintiff had been for months an employee in that yard and may reasonably be presumed to know the usual rate of speed at which trains, and especially switch trains, were run therein. The proof further establishes the fact that switch trains were run at all hours, and especially during the day time, and persons familiar with the facts in relation thereto in crossing that switch yard were bound to know that switch trains were working therein and might at any moment cross the place where the collision occurred.

The Supreme Court of the United States in the case of Continental Improvement Company *vs.* Stead, 95 U. S., p. 167, said: " It is shown by the evidence and not disputed that the plaintiff was accustomed to pass this crossing, and may be presumed to know and be acquainted with the usual rate of speed with which trains pass this crossing, and if this train was not moving at a greater rate he should be held as bound to exercise such care and caution as to avoid collision with such trains moving at usual rates and times."

Wilds vs. *Hudson River Railway Company*, 29 N. Y., 315.

Woods Railway Law, Vol. 2, pp. 1312, 1315, 1323, 1324, 1325, 1326, 1330, 1331.

Rorer on Railroads, Vol. 1, pp. 541, 542 and 551.

Thompson on Negligence, 1, Vol. p. 418.

Cohen vs. *Eureka & P. R.R. Co.*, Vol. 9, The Reporter, 648.

Bellefontaine R.R. Co. vs. *Hunter*, 5 Am. Rep., 201.

Pence vs. *C. R. I. & P. R.R. Co.*, 19 Am. and Eng. R.R. C., 367.

Goodwin vs. *C. R. I. & P. R.R. Co.*, 11th Am. and Eng. Railroad Cases, 460.

B. & M. Railroad Company vs. *Wendt.*, 12 Nebraska, 78.

Pierce on Railroads, p. 354.

Lake Erie & Western Railway Co. vs. *Zoffinger*, 15 Am. & En. Railroad Cases, 371.

The plaintiff was bound to exercise care and caution proportionate to the known danger.

Continental Improvement Co. vs. *Stead*, 95 U. S. Rep., 167.

Tucker vs. *Duncan*, 6 Am. & Eng. Railroad Cases, 268.

Wabash Railroad Co., *Heaks*, 91 Illinois, 406.

2 *Woods Railway Law*, p. 1331.

Railroad Co. vs. *Whitacre*, 35 Ohio State, 627.

POINT V.

The question as to whether or not the place where the accident occurred was a public highway was in issue, and the trial Court erred in permitting a witness to state that he knew it was a public highway; such testimony is not competent. There being no competent testimony to show the dedication and acceptance of a public highway, or such immemorial usage as to estop a denial of such dedication and acceptance, the trial Court erred in giving instructions numbers 6 and 2, and also instruction number 1, requested by defendant in error, in which the Court instructs the jury:

(a.) To determine whether or not the place where the accident occurred is a public highway;

(b.) Also assumes that it is a public highway, and that plaintiff in error must exercise all the care and diligence required of a common carrier at a crossing of a public highway;

(c.) Also that no form or ceremony is necessary to the dedication of a public highway.

The trial Court permitted witness W. R. Skelton to answer the question: "State whether or not

" there was such a public highway in Sprague at " that time as 'B' Street." The question was answered in the affirmative.

The question as to whether or not the place where the accident occurred was a public highway was in issue in the cause, and it was only competent to prove the existence of a public highway by producing documentary evidence of the dedication and acceptance, pursuant to the statutes, or by evidence of immemorial usage; it was not for witness Skelton to say whether or not the place where the accident occurred was a public highway. That was a matter of fact for the jury to determine, if there had been any competent evidence submitted to them.

1 Rorer on Railroads, pp. 552–553.
Webb vs. *Portland, &c., R.R. Co.*, 57 Me., 117.
Abbot's Trial Evidence, 586.
Greenleaf on Evidence, Sec. 1662 (15th Ed.)

This incompetent testimony of Skelton, which should not have been received, was the only testimony before the jury of any nature whatever tending to show a dedication of this place as a public highway, or immemorial usage thereof as a public highway, and we therefore contend that instruction number 6, given by the trial Court to the jury, was erroneous, in as much as it submitted to the jury the question as to whether or not the place where the accident occurred was a public highway; we do not contend that the instruction would have been erroneous had there been any proper evidence before the jury to show the dedication of a public highway. But there being no such evidence, we do contend that the instruction was erroneous, prejudicial, and should not have been given.

Instruction number 1 requested by defendant in error and given to the jury is erroneous, for the same reason that instruction number 6 is erroneous, namely, that it is misleading and prejudicial, inas-much as there is no competent evidence before the jury on this point.

The Court gave of its own motion the following instruction: "Upon the question as to whether the defendant by its servants pushed its train down upon the plaintiff with such speed as to constitute that an act of negligence, and as to whether the defendant failed to give warning of the approach of its train, and was guilty of negligence therein, I instruct you that the defendant was bound to use such care in pushing its train over public highways in the town of Sprague as men of common prudence and intelligence would ordinarily use under like circumstances, taking into consideration the frequency with which the crossings were used by the public, the difficulties by reason of the situation and surroundings of the crossing in avoiding collisions, and the results likely to ensue from collison, and that the absence of such care by the defendant in this case would make the defendant guilty of negligence for which the plaintiff may recover if he was injured thereby."

This instruction is erroneous in the following particulars:

In submitting to the jury the question as to whether the train was pushed "with such speed as to constitute that an act of negligence." No rate of speed of itself, and especially where the rate is not regulated by statute, ordinance or usage, is negligence *per se.*

Chicago, B. & Q. Railroad Co. vs. *Harwood*, 30 Ills., 88.
Moker vs. *Atlantic & P. Railroad Co.*, 66 Missouri, 267. (*8. Am. R. C.*, 406.)
McKonkey vs. *C. B. & Q. Railroad Co.*, 40 Iowa, 205.
Grand Rapids & I. Railroad Co. vs. *Huntley*, 38 Michigan, 537.
6 Am. and Eng. Railroad Cases, 124, note.
Pierce on Railroads, 354.
Rorer on Railroads, 551.
2d Woods' Railway Law, 1097.

The instructions with reference to warning is too general.

Woods' Railway Law, Vol. 2, 1322.
Chicago, &c., Railroad Co. vs. *Robinson*, 106 Illinois, 142.
Chicago & Alton R.R. Co. vs. *Alton*, 13 A. & E. R.R. Cas., 620.

The instruction assumes as conceded or established a controverted point, to wit: That the place where the collision occurred was in a public highway.

Pennsylvania Railroad Co. vs. *M. Light*, 46 Penn. St., 316.
Chicago, &c., Railroad Co. vs. *Robinson*, 13 Am. & Eng. Railroad Cases, 620.

The jury is instructed therein that it was the duty of the railroad company to run its trains at such a rate of speed as a man of common prudence and intelligence would ordinarily run. Such is not the rule. The railroad company is required to run its trains at such a rate of speed over crossings as experienced railroad men have found to be safe.

Rogers Expert Testimony, 145–6–7.
Cooper vs. *Railroad Co.*, 44 Iowa, 140.

The instruction assumes that if the plaintiff in error failed to give due warning and run its trains at a rapid rate, that these acts themselves constitute negligence, and that the plaintiff could recover, notwithstanding he was guilty of contributory negligence.

2 Woods' Railway Law, 1253, 1322.
1 Rorer on Railroads, 733.
Railroad Co. vs. *Krouse*, 15 Am. R. Rep., 298.

The instruction assumes that said train was pushed down upon the plaintiff. The testimony shows that the train was at its usual work in the switch yard, and it further shows that the plaintiff was attempting to cross that switch yard while the train was at such work at a place traveled by the public. There is nothing in the case to warrant the assumption that the train was run down upon the plaintiff.

POINT VI.

Instruction Number 8 given by the trial Court to the jury was erroneous and prejudicial.

The Court gave the following instruction:

"8. If, however, the witnesses who testify differently to the same facts are all of them of equal candor, fairness, intelligence and truthfulness, and equally well corroborated by all the other evidence, and are upon an equal footing as to interest in the result of the suit, then the preponderance of evidence as to that fact would be determined by the number of witnesses."

This instruction contravenes the rule well established that the jury are the exclusive judges of the weight of testimony. It makes the testimony of all witnesses possessing the *six qualifications therein mentioned equal*, and is erroneous.

In Griffith *vs.* B. & O. R.R. Co., 44 Fed. Rep., 574, it was held, other things being equal, that the testimony of the engineer and fireman of the train that the whistle was blown and the bell rung as it approached the crossing is entitled to more weight than the negative testimony of other witnesses that they did not hear either or both.

In Horn *vs.* B. & O. R.R. Co., 54 Fed. Rep., 301, the Circuit Court of Appeals, 6th Circuit (Feb. 7, 1893), decided that the testimony of some credible witnesses that they heard the whistle and bell of the engine is not in conflict with the testimony of others who heard nothing; for the observation of the fact by some is entirely consistent with the failure of others to observe, or their forgetfulness of its occurrence (following the decision of Stitt *vs.* Huidekopers, 17 Wall., 303). The Court, at page 305, said: "In the very nature of things, their affirmative testimony that the warning was given must be accepted as proof of that fact, notwithstanding an equal or greater number of witnesses failed to notice it, from whatever cause. While his conduct is persuasive that he did not hear the train, it is clear that, had he stopped and listened, he would have heard at least, as others did, the warning of the whistle, if not the noise of the train. It is incredible that the decedent, if his sense of hearing was not blunted, could have failed to notice the approach of the train. And it is obvious that, if he did hear it, he must have made a fatal calculation as to its proximity when he urged his horse over the crossing."

The instruction ignores the duty of the jury to take into consideration the opportunities of the several witnesses for seeing and knowing the things about which they testify. This is aptly illustrated in the testimony of the witnesses Slater and Johnson. They were employees of the plaintiff in error at the time of the collision. They were afterwards discharged, and neither of them in the employ of the plaintiff in error at the time they testified. They possessed the *six iron-clad qualifications* mentioned in the instruction. Johnson testified that he was ringing the bell while the train was approaching the crossing continuously. Slater testified that during that time, with a truck, he was handling freight; moving it from the cars into the depot; that he listened for the ringing of the bell and that it did not ring. In this case, Johnson's opportunities for knowing that the bell was ringing were far better than those of Slater, and his testimony is entitled to more weight at the hands of the jury, other things being equal.

Another illustration may be drawn from the testimony of Maloney and Nelson. Maloney testified that he knew the ground from White's saloon to the crossing. Had known it for years. That he took a buggy six inches lower than the one that Holmes was riding in at the time of the collision; had trains placed in the various positions they were on the day of the collision, and while they were in these various positions drove from White's saloon down to and over the crossing; that he could see the train in any of the various positions at all times from any place from White's saloon down to the crossing, with the exception of a distance of about 20 feet. Nelson testified that he had resided in the town many years and was a liveryman; that the train could not be seen from these various positions; that he had never made any experiments; never had passed in a carriage the height of the one Holmes was in or one six inches lower, over the ground; was an old man with diversity of business and shortsighted. Yet the two possessed the six qualifications or requisites of equality enumerated in the instruction.

It omits the element of forgetfulness.

Stitt vs. *H~~uelekofers~~*, 17 Wallace, 394.
uidekopers

In the case of Slater or other similar cases the rule should include deafness.

Abbott's Trial Brief, 151.

The rule should also exclude witnesses who testify hesitatingly and doubtfully, and not positively and clearly.

Mayor vs. *Meed*, 83 Illinois, 19.
Miller vs. *Balthouser*, 78 Illinois, 302.
Durant vs. *Rogers*, 87 Illinois, 508.
Wittaker vs. *Parker*, 42 Iowa, 585.
Delvey vs. *Portland*, 20 Louisiana, 446.
Lawrence vs. *Maxwell*, 58 Illinois, 511.
Johnson vs. *Wydem*, 32 Maine, 230.
Sackett on Instructions to Juries, 24, 36.

The instructions should have included equal experience, knowledge or information of the subject matter of the testimony. Under this instruction the jury would have been warranted in giving as much weight to the testimony of Saloonkeeper Rickett, concerning the rate of speed, who only occasionally noticed the passing trains, as they would to the testimony of Engineer Ladd, who had grown old bringing his train in on time.

Rogers' Expert Testimony, pp. 60, 61, 62.
1 Thompson on Negilgence, p. 431.

The opinion announced in deciding the case in favor of defendant in error, on rehearing, practically concedes that the 8th instruction to the jury does not state the law correctly (See. Rec., p. 9), but it maintains that while it is an error it is not a material error, for two reasons:

1st. The Court said that the jury were required by instruction 7 to consider the possibilities of seeing and knowing the particular things about which they testified and the probability or improbability of the truth of their several statements, in view of all the other testimony, and to consider the facts and circumstances testified to upon the trial.

The Court seems to have forgotten that the 8th instruction is an express limitation upon the subject, and that the jury were told in the 8th instruction to disregard the 7th in case they found the facts enumerated in said instruction 8 to exist, and if they found said facts to exist, they were told by the 8th instruction, to disregard the 7th and find in favor of the fact upon which the greater number testified.

The 8th instruction commences with the words "if, however," these are limiting and qualifying words; plainer language could not be used directing the jury to find in favor of numbers, if they found the existence of certain facts. The jury take the law from the Court, and the law as given here is an error and a misdirection, and in such case the law presumes injury and prejudice.

In Railway Company *vs.* Krouse, 30 Ohio State, 222, the Court says: "Where the Court in its general charge to the jury correctly states the general principles applicable to cases of the kind on trial, but follows it by an erroneous specific instruction on a controlling point, as to the legal effect of the case made by the evidence before the jury which if followed misleads the jury, such erroneous specific charge is not cured by the general charge.

2d. It is stated by the Court, while conceding that the instruction is wrong, that it is not prejudicial in this case, for the reason that the majority of witnesses testifying to any material point are in favor of the company. This is a mistake as to every material point in the case. The seriousness or permanency of plaintiff's injuries were material facts.

The only medical expert called by the company was Dr. Pomeroy; complainant called as medical experts, Drs. Burton, Johnson and Martin.

As to whether the bell was ringing continuously, while the train was backing up, was also a material fact. The witnesses called by the company to testify to that fact were the engineer, fireman and Vinyard; the witnesses called by the defendant in error on said point, were Holmes, Skelton, Nelson, Peterson, Breslaun, Fish, Slater, Rickett and Smith.

As to the speed of the train the company called Blackwell, Wishard, Vinyard, Ladd and Johnson; the plaintiff called Holmes, Skelton, Nelson, Skelton, Jr., Peterson, Breslaun, Fish, Slater and Smith.

The foregoing are sufficient to show that the statement of the Court is a mistake as shown by the record itself.

POINT VII.

The trial Court erred in giving instruction No. 16 to the jury.

"Well enough" are objectionable words in this instruction. The rule is an unbending one, that the traveler approaching a railroad crossing if he can see or hear a railroad train but not "well enough" to understand its movements, is bound to ascertain whether it is approaching the crossing or not. If while in a state of uncertainty he attempts to cross, he takes the chances and must abide the consequences."

Morris & Essex Railroad Co. vs *Hoslan*, 33 New Jersey Law, p. 150.

2d Wood on Railway Law, pp. 1320, 1321, 1322, 1323.

Beach on Contributory Negligence, p. 192.

Union Pacific Railroad Co. vs. *Adams*, 19 Am. & Eng. Railroad Cases, 376.

Baltimore & Ohio Railroad Co. vs. *Hobbs*, 19 Am. and Eng. Railroad Case, 337.

Schofield vs. *Chicago, Milwaukee & St. Paul Railroad Co.*, 2 McCrary, 268.

Schofield vs. *Chicago, Milwaukee & St. Paul Railroad Co.*, 114 U. S., 615.

Railroad Co. vs. *Houston*, 95 U. S., 697.

POINT VIII.

The trial Court erred in refusing to give instruction number 20, requested by plaintiff in error.

Defendant in error showed by his own witnesses that the usual rate of speed of switch trains in the yard was from 12 to 15 miles per hour, and that he was acquainted with the yard and knew the usual rate of speed of switch trains therein; certainly a train running at half the usual rate was not running too rapidly, and the Court should so have instructed the jury.

Pierce on Railroads, p. 354.

Powell vs. *Missouri Pacific Railroad Co.*, 8th Am. & Eng. R.R. Cases, 468.

Elizabeth & Nashville R.R. Co. vs. *Milan*, 10th Tennessee, 223.

Goodwin vs. *Chicago, &c., Railroad Co.*, 11 Am. and Eng. R.R. Cases, 462, 463.

POINT IX.

The trial Court erred in not granting plaintiff in error's motion for a nonsuit.

This Court, in Col. R.R. Co. *vs.* Hawthorn, 144 U. S., 202, decided that if defendant, at the close of plaintiff's evidence, and without resting his own case, requested and is refused a ruling for a nonsuit, such refusal cannot be assigned as error, if the defendant afterwards introduced testimony; this ruling, however, does not apply to the case at bar, for the following reasons:

Under the Statutes of the Territory of Washington and the practice in that Territory, the defendant in an action of this kind, is given the right to move for a judgment of nonsuit if plaintiff fails to prove a sufficient cause for the jury; if this motion is denied, the defendant has a right to assign and urge this error in the Supreme Court, and that Court is obliged to determine the question, regardless of the fact that defendant introduced testimony after making said motion.

The Statutes of Washington (Vol. 2, Hill's Stats. and Code of Washington, Secs. 409, 1405 and 1429) are as follows:

"Sec. 409. An action may be dismissed, or a "judgment of nonsuit entered in the following "cases: * * * * 8. By the Court upon the "motion of defendant, when upon the trial the "plaintiff fails to prove a sufficient cause for the "jury."

The right of plaintiff in error to insist upon and urge error of the trial Court, in denying its motion for a nonsuit was not waived by the introduction of testimony.

The Code of Washington Territory contains the following provisions:

"Sec. 1405. A party desiring to appeal from "any * * * judgment may, by himself or attor- "ney, give notice in open court. * * * If the ap- "peal be not taken at the time the judgment is "rendered * * * then the the party desiring to "appeal may, by himself or attorney, at any time "within six months after the * * * judgment "complained of was made, give notice in writing "to the prevailing party or his attorney that he "appeals from said * * * judgment to the Su- "preme Court."

"Sec. 1429. The Supreme Court may affirm, re- "verse or modify any judgment or order appealed "from and may direct a proper judgment or order "to be entered, or direct a new trial or future "proceedings to be had. * * *"

The appeal in this case was from the judgment (Rec., p. 35).

In addition to these statutory provisions giving the defendant the right to assign and urge as error the denial of a motion for nonsuit at the close of plaintiff's testimony, and before resting its case, the Supreme Court of Washington Territory have, in a vast number of cases, considered and passed upon the question as to whether or not a motion for nonsuit made at the close of plaintiff's testimony, and before defendant had rested its case, should be granted or denied.

> *Northern Pacific R.R. Co.* vs. *Holmes*, 14 Pac. Rep., 688.
>
> *Tolmie* vs. *Dean*, 1 Wash. Ter. Rep., 46.
>
> *Ward* vs. *Mooney*, 1 Wash. Ter. Rep., 106.
>
> *Mace* vs. *Gaddis*, 3 Wash. Ter. Rep., 125.

The Supreme Court of Washington Territory has therefore construed these statutes as giving a defendant the right to urge and assign such refusal as error.

This Court in B. & O. R.R. Co. *vs.* Baugh, 149 U.S., 368, decided that the 34th section of the judiciary act providing "that the laws of the "several States, except where the Constitution, "treaties or statutes of the United States shall other-"wise require or provide, shall be regarded as rules "of decision, in trials at common law, in the "Courts of the United States, in cases where they "apply," was limited in its application to the positive statutes of a State and the construction thereof adopted by the local judicial tribunals.

The decision of this Court in Col. R.R. Co. *vs.* Hawthorne, *supra*, seems to have been based upon the law and practice prevailing in cases appealed from Federal Courts, and we respectfully submit that it is not applicable to cases coming from a State or Territory in which the rules of practice differ from those in Federal Courts. We also beg leave to respectfully suggest that the rule laid down in the Col. R.R. case and cases there cited, has been established by this Court upon the primary authority of Trunk Ry. Co. *vs.* Cumming, 106 U. S., 700. Chief Justice Waite, in delivering the opinion in that case, said:

"It is undoubtedly true that a case may be "presented in which the refusal to direct a verdict "for the defendant at the close of the plaintiff's "testimony will be good ground for the reversal of "a judgment on a verdict in favor of the plaintiff, "if the defendant rests his case on such testimony "and introduces none in his own behalf; but if he "goes on with his defense and puts in testimony "of his own and the jury, under proper instruc- "tions, finds against him on the whole evidence, "the judgment cannot be reversed, *in the absence "of the defendant's testimony*, on account of the "original refusal, even though it would not have "been wrong to give the instruction at the time it "was asked."

"The present case comes within this rule. The "evidence introduced on the part of the company "is not in the bill of exceptions, and the Court was "not asked to instruct the jury to find for the "defendant on the whole case. Under such cir- "cumstances it must be presumed, in the absence "of anything to the contrary, that when the case "was closed on both sides, there was enough in "the testimony to make it proper to leave the "issues to be settled by the jury. In this we are "not to be understood as saying that the instruc-

"tion ought to have been given when it was "asked."

This ruling seems to have been made in this case only on account of the absence of defendant's testimony.

This question was next presented to this Court in Accident Co. *vs.* Crandell, 120 U. S., 527, in which case the Court said: "The refusal of the "Court to instruct the jury at the close of the "plaintiff's evidence, that she was not entitled to "recover, cannot be assigned for error, because "the defendant at the time of requesting such an "instruction had not rested its case, but after-"wards went on and introduced evidence in its "own behalf." This Court cited as authority the case of Grand Trunk Ry. Co. *vs.* Cummings, *supra.*

This rule was next announced by this Court in Nor. Pac. R. R. Co. *vs.* Mares, 123 U. S., 710, wherein the Court laid down the same general rule and cited the cases of Grand Trunk Ry. Co. *vs.* Cummings, *supra*, and the Accident Co. case, *supra*, as authorities.

This rule was next announced by this Court in Robertson *vs.* Perkins, 129 U. S., 233, in which case the Court cited as authority the Grand Trunk case, the Accident Co. case, and the Northern Pacific case.

We therefore respectfully suggest that the case at bar is properly distinguishable from the cases where this Court has announced the rule that it will not review the denial of a motion for nonsuit made at the close of plaintiff's case, if the defendant afterwards introduces testimony, and that the right of the plaintiff in error in the case at bar to have the denial of the motion reviewed here is a right given by the Statutes of Washington Territory as construed by the local tribunals in that jurisdiction.

The motion made by plaintiff in error for a nonsuit was made upon the ground that the testimony adduced on behalf of defendant in error showed clearly and conclusively that he was guilty of such contributory negligence as to preclude recovery in this case. We have presented in this brief, under Point I., a resumé of the testimony showing plaintiff's contributory negligence, and have cited a large number of decisions holding that defendant in error, on his own showing, was guilty of such contributory negligence as to make it the duty of the Court to determine as a matter of law that he could not recover, and enter judgment of nonsuit; we refer the Court to the testimony and authorities cited under Point I. of this brief, as showing defendant in error's contributory negligence.

Respectfully submitted,

JAMES McNAUGHT,
A. H. GARLAND,
For Plaintiff in Error.

SUPREME COURT OF THE UNITED S

OCTOBER TERM, 1895

No. 851

NORTHERN PACIFIC RAILROAD COMPA
PLAINTIFF IN ERROR

vs.

JAMES HOLMES, DEFENDANT IN ERROR

IN ERROR TO THE SUPREME COURT OF THE STA
WASHINGTON.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893

No. 354

NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR

vs.

JAMES HOLMES, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

The defendant, not waiving his motion heretofore filed herein to dismiss the writ of error, submits the following brief upon the merits:

I.

The first assignment of error is no more than a conclusion, which will follow in case some one of the other errors assigned were well taken.

II.

Should a nonsuit have been directed?

The testimony offered in behalf of the defendant in error tended to prove the following facts:

Some time previous to the accident which is the foundation of this action, the plaintiff in error had constructed its railway through the town of Sprague, in Washington Territory. (Transcript, pp. 49–50.) The course of the railroad was nearly east and west. There was such a grade, that cars released from their brakes would start and run towards the west of their own motion. (Tr., 88, 115.)

At the east end of the town, and on the south side of its main track, was located the company's round house and car shops. A public highway, called B street, crossed the main line of railway at right angles, and some little distance west of the round house and car shops. There was another street and crossing leading from the north to the south side of the town, which was located either one or two blocks west of B street, but which, on the day in question, had been so obstructed by the company's employes as to be impassable.

Moreover, B street was the principal thoroughfare of the town. (Tr., 50.) In the space between B street and the car shops a number of tracks and switches were laid for the use of the company, and in which it was the custom to make up trains, and in so doing the main line, which crossed B street and to the west of it, was used when necessary or convenient. Abutting onto B street on the east, and within a few feet of the main line of railway, the company had built a large building, which was 12–14 feet in height from the ground to the eaves, and which was used as its freight depot and warehouse. On the south and west side of it was a platform some 14 feet wide. South of the building and platform and parallel with it, and four or five feet north of the main line, a side track was built which extended west across B street. This side track was laid within two or three feet of the platform, and was used to stand cars on while they were being loaded and unloaded. From the west end of the platform, and south side of it, an incline about fourteen feet long was built from the platform into the street. The company had also constructed on the west side of the platform a plank crossing, which extended north from the main line from twenty-five to thirty feet. This planking was from twenty to twenty-five feet wide. West of the warehouse and between that and the main track the crossing was raised between twelve and eighteen inches from the ground.

The defendant in error had been employed in the company's car shops and had frequently passed over its yard in going to and returning from his work (Tr., p. 77), and was well acquainted with the town, the shops and the railroad tracks there at that time (Tr., p. 77). but for some little time previous to the accident he had not been in such employment.

Two hundred feet northwest from the crossing, and at some considerable elevation above it, the saloon building of W. H. White, in company with other houses on that side of Railroad street, stood facing the south. From White's to a point about forty feet directly north of the railroad track the ground was gradually descending, until somewhere near this point the surface of the street was about one foot below the level of the railroad at the crossing. From White's, a part of the way at least, to B street the ground was sufficiently high that a person could have seen a train, if one had been approaching from the east, for a long distance. Coming to the crossing from the low point already mentioned, no further view of a train approaching from the east could be obtained until one was far enough advanced to have been seen by or around the south side of the warehouse (Tr., p. 56). On the day in question three box cars, each 32 feet in length, had been run onto the side-track already mentioned, and were left standing so that the westernmost one reached beyond the warehouse and impinged upon the planking in the street and beyond the incline from two to five feet. These box cars, in connection with the warehouse, so completely obstructed the view to the eastward that no train approaching from that direction could have been seen until a person's horses were almost upon the rails of the main track.

Between three and four o'clock in the afternoon of November 1, 1883, the defendant in error came into Sprague from the north, in company with W. H. White. They were riding in a thorough-brace buggy, the seat of which was about two inches higher from the ground than that of an ordinary buggy. The team they were driving, though spirited, was gentle and manageable. On coming into town they drove to the front of White's saloon, where the latter alighted, and immediately the defendant turned his team around and trotted it to B street, and then turned towards the crossing with the intention of passing over it.

While still about sixty feet from the crossing (Tr., p. 78), and probably just as he had turned south, he noticed a number of flat and box cars, a locomotive and a caboose passing on the main track from the west toward the east. They were moving at a speed of from twelve to fifteen miles an hour, and went out of his sight behind the box cars and warehouse already mentioned. The number of cars in the moving train, and the situation of the engine as to such cars, is stated differently by different witnesses;

yet all agree that the engine was headed east, and was not at either end, but was somewhere between the cars, and that the caboose was at the west end. At about the same time that the defendant saw this train going east he also saw Richard Fish and Matthew Breslaun, each in a two-horse wagon, the former in front and the latter immediately behind, and waiting on the south side of the crossing to pass over to the north. As soon as the train had passed, Fish and Breslaun started over the crossing. The defendant, approaching, met Fish at a point about thirty feet north of the railroad track, and just at the edge of the planking, each passing to the left of the other. As they were passing, Fish said, "Look out, or those cars will catch you," but defendant did not act as if he heard the warning, and he (Fish) did not believe that he, defendant, did hear it (Tr., p. 112) ; and the defendant testified that he was listening for a bell, if any should be ringing, and that he did not hear the warning. (Tr., p. 149). Here the defendant brought his horses to a walk, and so continued until he met Breslaun, which was as the wheels of his (B.'s) wagon were leaving the main track, and about as his own horses were stepping onto the rails. From the time the defendant had brought his team to a walk, until this moment, he says he had been listening intently for the ringing of the engine bell, but that he did not hear it ring. (Tr., p. 149). He also says that he had been watching Romick, the yard master, who stood at a switch on the south side of the main track, and on the west side of B street, and with whom he was acquainted, and believed that if a train should be approaching, he, Romick, would warn him of it. The train continued east so far, at least, as to clear a switch which was about 140 feet beyond the crossing, and, dropping one or two cars, was motioned by the yard master to reverse. At the time that he made this motion Romick was standing facing the north, and nothing prevented him from seeing defendant approaching the crossing, if he had looked. After motioning the train to reverse, he started to go east, and called to Breslaun, who was then on the crossing: "Hurry up, or I will take a wheel off." (Tr., p. 61.) This warning was not heard by Breslaun or the defendant. (Tr., 104.) The train was reversed and sent back towards the the crossing. At the time of starting west again witness Slater says the engine bell was given two or three taps; that he looked, and the engine was then near the offices, and that the offices were from 400 to 500 feet beyond (east) of the depot, and that it did not ring any more. (Tr., p. 117.) Breslaun attempted to warn defendant of his danger, but failed to do so. (Tr., p. 105.)

At about this moment defendant caught sight of the end of the caboose being pushed from behind the warehouse and box cars, which were standing on the side track, at a comparatively rapid rate. He instinctively slapped his horses over their backs with the reins, and they sprang forward. At about this time, witness Peterson, seeing the situation, called to defendant, but he seemed not to hear, and if he had heard and had stopped, Peterson said he would have been killed, for he was then upon the track. (Tr., p. 97, 99.) The horses succeeded in clearing themselves, but the caboose engaged the rear wheel of the buggy, and turning it upon its side, threw the defendant out, and onto the ground with great violence. He fell upon his head and right shoulder, and was so seriously injured that his life was for some time despaired of, and he was found to be permanently injured.

We also ask attention to some other facts quite as material, but which it has been found difficult to state in chronological order

It was the custom of the company to give warning of an approaching train by the ringing of the engine bell. (Tr., 56-7, 75, 110, 121.)

Defendant could not see the approaching train until he had passed the impinging box car. Witness Skelton said: "In the first place, the building standing there (the warehouse) obstructs the view of the road for a considerable distance to any one coming along this (B) street. These cars being there, he could not see the train on the track here at all, unless he would almost come past the car. He wonld have to be almost past the box car." (Tr., p. 53.)

The same witness says that he did not think a person could see the top of a caboose over the top of a box car. (Tr., p. 67.)

Nelson testified that with the track obstructed as it was at the time of the accident, a person could not see a train approaching from the east unless he stood within six feet of the track." (Tr., p. 89.)

Breslaun said: "Mr. Holmes could not" see the train. "There was box cars, and the building obstructed his view. "They wholly obstructed his view until he got on the track, or very near the track." (Tr., p. 104.)

Richard Fish said a person could not see the approaching train over the top of the box cars. (Tr., p. 111.)

There were at least three, and probably four, cars on the west end of the locomotive, or between it and the front of its work.

Skelton testified: "The locomotive was first this way (facing east), "and then there were two flats, I think, between that and the caboose. I am pretty positive there were two flats between that and the caboose, making three cars behind the locomotive." (Tr., p. 51.)

Peterson said; "Four cars were there—two flat cars, a caboose and one of those red-painted box cars." (Tr., p. 100.)

The train, while going east and while returning, was moving at a rapid rate of speed. Speaking of the train while moving west, Skelton said: "It was running the usual rate of speed—that is, of their switching speed, but I suppose, anyway, it was 12 to 15 miles per hour, because it was running down grade and went back pretty speedy"—(Tr., p. 52) — and on cross-examination he said: "I am positive it was running almost that rate, that fast, if not more. I should not put it lower than that."

Nelson said: "I should judge that it was moving 15 to 18 miles an hour from what I could tell by riding. I could not tell very close." It is not certain from the record that the witness was speaking of the speed of the train while going east or returning.

Breslaun, speaking of the speed at the time of collision, said: "Well, it was middling fast. I could not say as to the speed of the train, as to the miles per hour, if that is what you mean; but the train was going at rather a rapid rate." (Tr., 102, 103.)

Rickett said: "The train moved up and passed down very quick. I saw the train and thought that there was danger. It was reversed very quick, moved back very quick. These teams started just as soon as the track was clear, and they had scarcely time to clear the track. I noticed particularly because I thought there was going to be a collision." As tending, also, to show the speed of the train, Breslaun said he was about sixty feet south of the crossing and that he started over as soon as the train passed (Tr., p. 105), and that he met the defendant just as he (B.) was coming off the track (Tr., p. 101), and that his team was moving about four miles an hour (Tr., p. 104.) In other words, he had travelled no more than sixty or seventy feet, while the train travelled over two hundred and eighty feet. Defendant says he was at a certain point shown on the diagram when the train passed out of his sight going east (Tr., p. 68.) An examination of the plat will show a distance of something less than 60 feet from this point to the track on which the collision occurred.

No warning was given by any employe of the company of the approach of the train.

Skelton testified that he was standing on the sidewalk at the post office corner, and about 60 feet from the place where the accident occurred. (Tr., p. 57.) That he was also about 60 feet away from the locomotive; that he saw the colliding train; that he knew of nothing that would have prevented him from hearing the bell if it had been ringing, and that he did not hear it ring (Tr. p. 55), and that no signal was given by any employe of the company of the approaching train.

Holmes testified: "I trotted until I approached that planking, and there I met the other team, the forward team, and I checked from a trot to a walk, and listened if there was a bell or anything of that kind, or if there was a moving train. The other two teams coming, the yard master standing there, so I thought I was perfectly safe in going."

Q. You say you listened for a bell, Mr. Holmes?

A. Yes, sir.

Q. What was the result of your listening?

A. I heard nothing of any bell.

Q. State whether or not you heard anything else that would indicate the approach of a train?

A. Nothing to indicate the approach of a train. (Tr., p. 69.)

Nelson was standing thirty or forty feet below the switch, heretofore spoken of as on the west side of B street. He testified that he was in a position where he could have heard the bell if it had been ringing, and that he did not hear it. (Tr., p. 87.)

See also the testimony of Slater already referred to.

The train was reversed and started towards and over the crossing again, without taking any trouble to ascertain whether or not there would be any danger of injuring any one. No lookout was posted on the train, nor after Romick left the switch was any one so stationed as that the train could be signalled to stop, or Holmes could be warned of the impending danger.

Witness Skelton (Tr., p. 55), Holmes (Tr., p. 75), Nelson (Tr. p. 87), Breslaun (Tr., 104), all unite in saying there was no one on the west end of the colliding train.

No pretense is made that there was any flagman at the crossing.

The defendant, in approaching the crossing, listened as well as he could, and looked as soon as he could see.

When asked as to whether or not he saw Skelton, he said: "No; I did not. I was watching if there might be an approaching train." (Tr., p. 70.)

On cross-examination he was asked: "You say, then, that you checked your team just as you were getting to the planking, because you thought it was not safe to trot over the crossing?"

A. Yes, sir; I also listened; thought there might be a train coming down. I listened.

Q. Why did you suppose there might be a train coming down?

A. A man is never safe unless he looks out on a railroad crossing.

And on re-direct examination he said:

Q. I would like to ask, if you simply drove onto that crossing, and over it without doing anything except to walk the horses part way, and then slapped them up when you saw the danger?

A. I thought I stated the balance. It don't require any exertion for a person to listen and to look. I looked and listened, and used all the care I could for the train.

Q. State if you did that all of the time you were on the planking?

A. I did so. Yes, sir. (Tr., p. 82.)

Q. How long after you could see the car was it that you did see it?

A. Well, I think I saw it as soon as it was possible to see it. I saw the train moving towards me as soon as it was possible. (Tr., p. 82.)

Q. State whether or not you saw any motions of any kind or had any notice of any kind from anyone as to the approach of that train?

A. No, sir; I had no idea, no motion or notice of it. (Tr., p. 76.)

The only other crossing could not be used at that time, owing to obstructions placed in it by the company. (Tr., p. 76.)

They were not using the box car that was impinging on the crossing to either put freight into or to discharge freight from. (Tr., p. 114.)

From the foregoing testimony we submit that it appears:

I. That the employees of the company who had charge of the colliding train were not simply *negligent*, but in obstructing the view as it was uselessly obstructed by the lower box car especially, in starting the train back over the crossing so very soon after having passed it, and without making any inquiry as to whether or not such crossing would be clear when the train should reach it, and in moving the train down at the speed they did move it, or even at a much less speed, and without looking, as Romick, the yardmaster, had an opportunity of looking, and in failing to stop the train in time to avoid the collision, and in failing to ring the engine bell or to give any warning of the approaching train, a degree of indifference to human life and safety is shown that is little less than appalling in its atrocity.

II. Was defendant guilty of negligence contributing to the injury? and is such negligence so apparent as that his case ought to have been taken from the jury?

Ordinarily such a question is one of fact for the jury, and it is only when (*a*) the undisputed testimony shows such negligence conclusively, or (*b*) the inference to be drawn from the undisputed testimony is such that men of ordinary intelligence cannot honestly differ in their conclusions that it becomes a question of law for the court.

Stout v. Railroad Co., 17 Wall, 657, 663.

Delaware, L. & W. R. R. Co. v. Converse, 139 U. S. 469.

Grand Trunk Ry. Co. v. Ives, 144 U. S., 408, 430.

Richmond & Danville R. R. Co. v. Powers, 149 U. S., 43.

Craig v. N. Y., N. H. & H. R. R. Co., 118 Mass., 431.

Sullivan v. N. Y., etc., R. R. Co., (Mass.) 28 N. E. 911.

(*a*) The train which defendant saw going east behind the box cars and freight depot is the same train with which the collision occurred only ten to twelve seconds later. It is not an *approaching* train in the ordinary sense, but to the defendant it was a receding train, until at least he had received some notice that it had been stopped and reversed and started back over the crossing.

It can make no difference that the company had extended its switch yard into, or even across, this street, for B street was still a public highway.

It cannot be successfully contended that a switch train, at work in its yard is like a regular train approaching a crossing on its schedule; or that because it is liable to be upon a crossing at any time, therefore it is always on time. It may be conceded that the movements of a switch train are of necessity erratic; yet, that fact, if known to a highway passenger, conveys no notice that it is going to be at a given crossing at a given time. It is true that it *may* be there at any time; and so may any other train, for it is one of the necessities of railroad transportation that a company may send a train over its road at *any* time. And, therefore, it is, that so far as its liability to pass over a given crossing is concerned, there is no difference in principle between a switch train and any other unscheduled train. The difference is in degree, merely. A regular or scheduled train is not simply liable to be due at a certain point at a given time, but it is *due* at such time; and the economic and expeditious transaction of the company's business, and the safe transportation of its passengers, all demand that such train shall be at the appointed place at the time fixed.

Railroad transportation has reached such a state of perfection in the respect just mentioned, as that it has come to be a moral certainty that a given train will be at a given point the moment it is due. Whoever happens, therefore, to be so familiar with the movements of such a train as to know of its appointed time to pass over a particular crossing, knows, not merely that a train is liable to pass, but that this particular train is almost *certain* to pass at such time. Such knowledge is a better notice than the shriek of the engine whistle, or the bell, for if the train is approaching with great rapidity the latter kind of notice is frequently inadequate; but knowledge such as we have spoken of, is a mentor, constantly at the wayfarer's side, admonishing him of his peril.

We, therefore, submit that the mere fact that the defendant knew that the colliding train was a switch train, was not sufficient to bring to him notice of its stopping, its reversal and immediate return over the crossing.

(*b*) The train having been brought to a stop, the company had no right to start it back over the crossing without first ascertaining that the crossing would be clear when the train should reach it.

(*c*) It appearing that the engine bell was not ringing, that the defendant saw no signal, and heard no warning, the only thing upon which plaintiff in error can rely to bring notice to the defendant of the reversal and approach of the train towards the crossing, is the rumbling of the car wheels on the rails, which Slater testified, on cross-examination, could have been heard three or four hundred feet. (Tr., p. 117.)

In the first place, it does not appear that such rumbling could have been heard by Holmes, situated as he was; and, secondly, if he did hear it he might well have assumed that the train was continuing in the course it was moving when he last saw it.

(*d*) He had a right to rely upon the appearances of the crossing — the fact of the train going east only ten to twelve seconds before, the silence of the bell, the appearance on the crossing of Fish and Breslaun from a position where they could have seen the train if it had been reversed, the fact that the defendant was on the crossing almost the instant Breslaun was off from it, the presence of Romick, the yardmaster, in a position where he could have seen Holmes and have given him timely warning — all conspired to lead him to the belief that the crossing was safe.

Laverenz v. Chicago, R. I. & P. R. R. Co., 10 N. W. Rep., 268.

Bonnell v. Del., L. & W. R. R. Co., 39 N. J. L., 189.

Abbott v. Chicago, M. & St. P. R. R. Co., 11 N. W., 266.

Spencer v. Illinois Cent. R. R. Co., 29 Iowa, 55.

Pa. R. R. Co. v. Acherman, 94 Pa. St., 265.

Dolan v. Canal Co., 71 N. Y., 45.

P., C. & C. Ry. Co. v. Wright, 80 Ind., 236.

Shafer v. St. P. & C. R. R. Co., 28 Minn., 103.

(*e*) It being the custom of the company to give warning of an approaching train by the ringing of the engine bell, it became the duty of such employes to give such notice, Holmes had a right to rely upon the performance of that duty. It was his right to listen, as he said he did listen, for the ringing of the bell, and because it was *that* which would give notice of an approaching train.

Ernst v. H. R. R. Co., 39 N. Y., 61.

Mackey v. N. Y. C. R. R. Co., 35 N. Y., 75.

Cordell v. N. Y. C. & H. R. R. R. Co., 70 N. Y., 119.

Craig v. N. Y., N. H. & H. R. R. Co., 118 Mass., 431.

Artz v. Chicago, R. I. & P. R. R. Co., 44 Iowa, 284.

Tabor v. Missouri P. R. R. Co., 46 Mo., 356.

If, in listening for the bell, his mind was so absorbed that he did not hear Fish's warning, is he, for that reason, to be said to be negligent? The law says that those who do not listen at all are negligent, but will it assume to say that because it subsequently transpires that the information upon which a person depended, being false, and because he might, by making different inquiries, have learned the truth, that, therefore, he is negligent?

It is true that he might have inquired of Fish and Breslaun as to whether or not a train was approaching, and Fish, at least, would have given him such timely warning as would have prevented the catastrophe, but does this fact place it in the power of the company to say, because he chose to rely upon another kind of information, which he thought trustworthy, that, therefore, he is negligent? Having failed to give the warning, which custom and duty both required should be given, and having thus misled the defendant into a belief that the crossing was safe, can it now be heard to say that, if he had made the proper inquiries of some stranger, he would have escaped?

Ernst v. H. R. R. R. Co., 39 N. Y., 61, 66, 67.

Cordell v. N. Y. C. & H. R. R. R. Co., 70 N. Y., 119.

Mackey v. N. Y. C. R. R. Co., 35 N. Y., 75.

Craig v. N. Y., N. H. & H. R. R. Co., 118 Mass., 431.

Artz v. Chicago, R. I. & P. R. R. Co., 44 Iowa, 284,

Tabor v. Missouri & P. R. R. Co., 46 Mo., 353.

(*f*) If the defendant did nothing at all to ascertain the probability of an approaching train he was negligent, but whether or not, in attempting to discover the possible approach of a train, he employed the method that a man in the ordinary exercise of care and caution would have employed under such circumstances, is a question, not of law, but of fact, and as such, the Court was right in refusing the nonsuit, and in submitting that question to the jury.

(*g*) Holmes states and reiterates the statement that he did listen for the bell. Whether or not this statement was true was a question for the jury. The Court had no right to say, as a matter of law, that he was mistaken in that regard.

The circumstances being complicated, justified the Court in sending the case to the jury.

It was developed from Holmes' testimony that he had been riding since 7 or 8 o'clock in the morning; that the day was somewhat chilly, and that he had, during the course of the day, taken 5 or 6 drinks of whisky. Took just a swallow at a time. (Tr., p. 77.)

White says he was pretty sober. (Tr., p. 141, 142.)

Holmes himself says he was not affected by the liquor he had drank. (Tr., p. 123-4.)

If he was affected by the liquor taken, the extent to which he was so affected, and whether or not he was thereby prevented from exercising the caution which the law demanded of him, are questions for the jury.

III.

Witnesses for the plaintiff in error testify that the engine bell was ringing, and that the defendant had a somewhat better opportunity for seeing the approaching train than his witnesses had stated; but the jury have found all of these questions in favor of defendant. Besides the general verdict, the jury found, in answer to the special interrogatories propounded by plaintiff in error, and by the trial Court submitted to the jury that —

The box car on the side track was impinging on the crossing from 2 to 5 feet. (Int. 6 and answer.)

The train, at the time of the collision, was running between six and ten miles an hour. (Int. 18.)

The train stopped, reversed and commenced running back at one hundred and forty feet east of the crossing. (Int. 23.)

Defendant was not affected by the liquor he had drank that day. (Int. 26.)

When sixteen feet from the track he could see one-quarter of the caboose. (Int. 27.)

And when he had advanced one foot further he could not have stopped, and so have avoided the collision. (Int. 28.)

He could not, at a distance of forty or fifty feet from the rails, have seen the approaching train. (Int. 30, 31.)

He did not hear the warning given by Fish or Peterson. (Int. 33.)

Notwithstanding his failure to hear these warnings, he was in the exercise of reasonable caution and care. (Int. 34.)

Either three or four witnesses testified for plaintiff in error that the bell was ringing continuously from the moment the train started west to the time of the collision, while defendant's witnesses testified that it was not ringing at all, except that Slater said two or three taps were given the bell, the moment it started back.

The following question was put to the jury :

"Was the bell ringing at the time the train was backing down towards the crossing continuously and at the time of the collision ?"

Ans. We believe from the evidence it was not ringing continuously while backing down at the time of the collision. (Int. 39.)

There being no testimony that the bell was ringing a part of the time, this answer amounts to an affirmance of the theory of defendant in error.

He might have been using reasonable care and caution and still not have seen Romick's motion to reverse the train. (Int. 41.)

Having seen the train go east, he did not have reason to suppose it would return so soon. (Int. 42.)

The crossing was a public highway. (Int. 46.) (Tr. pp. 5, 6, 7.)

IV.

The requests mentioned in the Fourth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth and Sixteenth Assignments were refused by the trial court.

If the judge instructed the jury fully and correctly upon the questions involved in the case, nothing more could be asked.

Continental Improvement Co. v. Stead, 95 U. S., 161.

Whitton v. Ry. Co., 13 Wall, 271.

As to the Fourth Assignment above mentioned:

It is a question of fact, rather than one of law, whether or not, under the circumstances shown, the ringing of the bell would have given adequate notice of the backing down of the train.

Shafer v. St. P., etc., R. R. Co., 9 N. W., 579.

McGinnis v. N. Y. C. & H. R. R. Co., 52 N. Y., 215.

McWilliams v. Detroit, etc., R. R. Co., 31 Mich., 274.

Bohan v. Milwaukee, etc., R. R. Co., 58 Wis., 30.

The instruction set out in the Ninth Assignment, is clearly misleading. The Court instructed the jury as to what negligence and what degree of negligence would bar a recovery. (Tr., p. 220, Nos. 14 and 15.)

The Court gave the instructions set out in the Fifth, Sixth, Seventh and Eighth Assignments.

As to the Fifth Assignment:

I. The second ground upon which the instruction is said to be erroneous was not urged in the Court below. (See 15th description of error, p. 39.)

II. That the place where the collision occurred was a highway is undisputed.

Delaware, L. & W. R. R. Co. v. Converse, 139 U. S., 469.

III. The Court submitted the question as to whether or not the place where the accident occurred was a highway. (Tr., p. 218, § 5.) Neither the third or fourth points were made in the Court below. (Tr., p. 39, xv.)

As to the Seventh Assignment:

If the Court will consider the other part of the instruction given in connection therewith, we think it will be apparent—

1. That the jury was correctly informed as to the consideration to be given to the testimony of each witness.

2. That even if not logically perfect, it was not an instruction upon the law of the case, but only a general rule to aid the jury in properly weighing the testimony of the several witnesses.

Whitton v. Ry. Co., 13 Wall, 290–291.